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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether due process allows a state to impose punitive damages based on the actual and potential effects of the defendant's wrongful conduct throughout the state?

2. Whether the ratio between compensatory and punitive damages comprises the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict?

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Boeken v. Philip Morris, Inc., 26 Cal. Rptr.3d 638 (Cal. App. 2d Dist. 2005), *cert. denied*, 126 S.Ct. 1567 (2006) 14

Brickell v. Frisby, 2 Rob. 204, 1842 WL 1659 (La. 1842) 41

Burns v. Prudential Securities, Inc., __ N.E.2d __, 2006 WL 1891829 (Ohio App. 2006) 24

Campbell v. State Farm Mut. Auto. Ins. Co., 2005 UT 34, 98 P.3d 409, *cert. denied*, 543 U.S. 874 (2004).....44

Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).....34

Casumpang v. Int'l Longshore & Warehouse Union, Local 142, 411 F.Supp.2d 1201 (D. Hawai'i, 2005) 25

Champion v. Vincent, 20 Tex. 811, 1858 WL 5406 (1858) 40

Chicago & Rock Is. R.R. Co. v. McKean, 40 Ill. 218, 1866 WL 4459 (1866).....39, 41

City of Chicago v. Martin, 49 Ill. 241, 1868 WL 5212 (1868) 40

Clemons v. Mississippi, 494 U.S. 738 (1990) 46

Conrad v. The Pacific Ins. Co., 31 U.S. 262 (1832) 38, 39

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) ..... *passim*

Cox v. Stolworthy, 496 P.2d 682 (Idaho 1972) 32

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 23

Dardinger v. Anthem Blue Cross & Blue Shield, 98 Ohio St.3d 77, 781 N.E.2d 121 (Ohio 2002) 43

Day v. Woodworth, 54 U.S. (13 How.) 363 (1851) 5, 6, 39, 40

Dibble v. Morris, 26 Conn. 416, 1857 WL 969 (Conn. 1857) 6, 39, 40

Donnelly v. Harris, 41 Ill. 126, 1866 WL 4550 (1866) 39

Durham v. Vinson, 602 S.E.2d 760 (S.C. 2004) 36

Engle v. Liggett Group, Inc., __ So.2d __, 2006 WL 1843363 (Fla. Jul. 06, 2006) 34

Estate of Schwarz v. Philip Morris, Inc., 206 Or. App. 20, 135 P.3d 409 (2006) 45

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 13

Frink & Co. v. Coe, 4 Greene 555, 1854 WL 228 (1854) 39, 41

Fritzmeier v. Krause Gentle Corp., 669 N.W. 699 (S.D. 2003) 36

Gaither v. Blowers, 11 Md. 536, 1857 WL 3817 (1857) 39

Gavin v. AT&T, Inc., __ F.3d __, No. 05-4398, 2006 WL 2548238 (7th Cir. Sept. 6, 2006) 28

Gilchrist v. Perl, 387 N.W.2d 412 (Minn. 1986) 31

Gober v. Ralphs Grocery Co., 137 Cal.App.4th 204, 40 Cal.Rptr.3d 92 (Cal. App. 2006) 24

Haines v. Liggett Group, Inc., 814 F. Supp. 414 (D.N.J. 1993) 33

Harmelin v. Michigan, 501 U.S. 957 (1991) 29

Hawk v. Ridgway, 33 Ill. 473, 1864 WL 2956 (1864).....40

Hawkins v. Allstate Ins. Co., 733 P.2d 1073 (Ariz. 1987).....31

Hendrickson v. Kingsbury, 21 Iowa 379, 1866 WL 321 (1866).....39

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994).....50

Hootman v. Shriner, 15 Ohio St. 43 (1864).....39

Hopkins v. Atl. & St. Lawrence RR., 36 N.H. 9 (1857)..23, 40, 41

In re Simon II Litig., 407 F.3d 125 (2nd Cir. 2003).....34

Johnson v. Ford Motor Co., 113 P.3d 82 (Cal. 2005).....35

Labonte v. Hutchins & Wheeler, 678 N.E.2d 853 (Mass. 1997).....32

Manderson v. Comm. Bank, 28 Pa. 379, 1857 WL 7384 (1857).....39

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Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (7th Cir. 2003).....23, 27, 28, 33

Mitchell v. Esparza, 540 U.S. 12 (2003).....49

Myers v. Workmen's Auto Ins. Co., 95 P.3d 977 (Idaho 2004).....36

Neal v. Farmers Ins. Exch., 582 P.2d 980 (Cal. Ct. App. 1978).....30

New Orleans, Jackson & Great .N. Ry. Co. v. Bailey, 40 Miss. 395, 1866 WL 1889 (1866).....39

New Orleans, Jackson & Great N. Ry. Co. v. Hurst, 7 George 660, 1859 WL 5326 (Miss. Er. App. 1859).....39

Nye v. Merriam, 35 Vt. 438, 1862 WL 2609 (1862).....39

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).....5, 26, 32

Parker v. Corbin, 18 F.Cas. 1122 (C.C.D. Ohio 1848).....38

Peshine v. Shepperson, 58 Va. (17 Gratt.) 472, 1867 WL 2892 (1867) 39, 40

Phelin v. Kenderdine, 20 Pa. 354, 1853 WL 6203 (Pa. 1853).....6, 40

Philip Morris USA Inc. v. Williams, 540 U.S. 801 (2003) 2

Pickett v. Crook, 20 Wis. 358, 1866 WL 2763 (Wis. 1866).....6, 39, 40

Pike v. Dilling, 48 Me. 539, 1861 WL 1691 (Me. 1861) 6, 39

Planned Parenthood of Columbia, Inc. v. Am. Coal. Life Activists, 300 F. Supp. 2d 1055 (D. Wash. 2004).....36

Polk, Wilson & Co. v. Fancher, 38 Tenn. 336, 1858 WL 2918 (1858) 39

Ramirez v. IBP, Inc., 950 F. Supp. 1074 (D. Kan. 1996) 33

Robertson Oil Co., Inc. v. Phillips Petroleum Co., 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 511 U.S. 1115 (1994) 24

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) 45

Seymour v. McCormick, 57 U.S. 480 (1853) 38

Smith v. People, 25 Ill. 17, 1860 WL 6489 (Ill. 1860).....6

Smyrna, Leipsic & Phila. Steamboat Co. v. Whilldin, 4 Del. (4 Harr.) 228, 1845 WL 479 (Del. Super. Ct. 1845).....41

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) .....*passim*

Stimpson v. The Railroads, 23 F. Cas. 103 (1847)(No. 13,456).....6, 38, 40

Towle v. Blake, 48 N.H. 92, 1868 WL 2266 (1868) 39

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1991) 26, 27

Union Pacific R.R. Co. v. Barber, 356 Ark. 268, 149 S.W.3d 325 (Ark. 2004) 24

United States v. Gonzales-Lopez, 126 S.Ct. 2557 (2006) 46

United States v. Philip Morris USA, Inc., Civ. Action No. 99-2496 (D.D.C. Aug. 17, 2006), *available at* http://coop.dcd.uscourts.gov/99-2496-082006a.pdf 9, 10, 14, 24

Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980) 32

Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004) 28

Williams v. Kaufman County, 352 F.3d 994 (5th Cir. 2003) 6, 27

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OR. REV. STAT. § 31.730 ..... 21, 22, 45

OR. REV. STAT. § 31.735 26

OTHER AUTHORITIES

ALI, REPORTER'S STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) 31

Allen, Michael P., *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1 (2004) 43

Bentham, Jeremy, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns ed. 1996) (1781) 32

Cohen, Larry R., *Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action*, 34 EMORY L.J. 295 (1985) 30

Colby, Thomas B., *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003) 38

Cordray, Margaret Meriwether, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275 (1999) 45

Dobbs, Dan B., *Ending Punishment in Punitive Damages: Deterrence – Measured Remedies*, 40 ALA. L. REV. 831 (1989) 23, 31

Ellis, Jr., Dorsey D., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982) 27, 30

Galligan, Jr., Thomas C., *Disaggregating More-than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117 (2003).....33, 34

Guardino, Sara D. & Richard A. Daynard, *Punishing Tobacco Industry Misconduct: The Case for Exceeding a Single Digit Ratio Between Punitive and Compensatory Damages*, 67 U. PITT. L. REV. 1 (2005) 34

Haddock, David S., *et al.*, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1 (1990) 30

Janutis, Rachel M. *Reforming Reprehensibility: The Continued Viability of Multiple Punitive Damages after State Farm v. Campbell*, 41 SAN DIEGO L. REV. 1465 (2004).....31

Kluger, Richard, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC

HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS (1997) 8

Landes, William M. & Richard A. Posner, THE ECONOMIC STRUCTURE OF TORT LAW (1987) 30

NCCUSL, MODEL PUNITIVE DAMAGES ACT, 14 U.L.A. 124 (Supp. 2003) 31

Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 715 (1957) 25

Owen, David G., *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363 (1994) 6, 25

Polinsky, A. Mitchell & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) 22, 30

Priest, George, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825 (1996) 27

Rustad, Michael L., *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1992) 30

Sebok, Anthony J., *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI-KENT L. REV. 163 (2003) 39

Sedgwick, Theodore, A TREATISE ON THE MEASURE OF DAMAGES (7th ed. 1880) 38

Sharkey, Catherine M., *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003) 44

Sutherland, J.G., A TREATISE ON THE LAW OF DAMAGES (4th ed. 1916) 39

Viscusi, W. Kip, *The Social Costs of Punitive Damages*, 87 GEO. L.J. 285 (1998) 30

Zipursky, Benjamin C., *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) 38

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Petitioner Philip Morris engaged in one of the longest running, most profitable, and deadliest frauds in the annals of American commerce. Jesse Williams died of lung cancer in 1997 as a result of that lethal fraud. J.A. 66a-67a; Tr. Vol. 11-B at 40-41; Pl. Ex. 159. By then, Philip Morris had known for at least 40 years that cigarettes cause cancer and that millions of American smokers, about half of whom were its customers, were addicted to the nicotine in cigarettes. J.A. 62a-68a, 111a-113a, 221a; Tr. Vol. 12-B at 91-92; Pl. Ex. 36 at 2, Pl. Ex. 159. In order to stop existing smokers from quitting, encourage others to take up smoking, and maximize profits, Philip Morris vehemently denied the connection between smoking and cancer, as well as the addictive character of nicotine. It asserted that the research was wrong or inconclusive and reassured its customers it would never jeopardize their health. Pet. App. 38a-40a.

Jesse Williams's wife, Mayola, brought suit against Philip Morris after promising her dying husband that she would hold it responsible for betraying his trust. Tr. Vol. 12-B at 93-95. The lawsuit claimed that Philip Morris mounted a massive, fraudulent campaign to sow doubt about smoking and disease, knowing that it was likely to be effective with highly addicted smokers like Williams.

After a month-long trial, the jury found Philip Morris negligent but also found Williams 50% negligent. J.A. 289a. The jury also found Philip Morris liable for misrepresentation. J.A. 290a. It awarded $21,485.80 in economic and $800,000.00 in non-economic damages for each claim.[1] J.A. 289a. As to misrepresentation, the jury

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[1] A wrongful death cap reduced the $800,000 verdict to $500,000. J.A. 292a, citing OR. REV. STAT. § 18.560(1).

specifically found that "defendant ma[d]e false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied" and that "such false representations and reliance [were] a cause of damages to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988." *Id.*

On punitive damages, the jury was instructed, among other things, to consider "the likelihood that serious harm would arise in this state," the "defendant's awareness of that likelihood," and the profitability of defendant's misconduct in this state." J.A. 283a. Employing a clear and convincing evidence standard, the jury awarded $79.5 million in punitive damages. J.A. 291a. On Philip Morris's motion, the trial court found the punitive damages within the range that a rational juror could assess, but still reduced it to $32,000,000. J.A. 292a.

Both parties appealed. The Court of Appeals upheld the finding of fraud. J.A. 307a. It found that the evidence would permit the jury to conclude that Philip Morris misrepresented that smoking was not harmful to a person's health and that it intended Williams and other Oregon smokers to rely on this misrepresentation. J.A. 332a-333a. Further, the court found that a number of Williams's statements constituted direct evidence that he relied upon Philip Morris's misrepresentations and that the company "caused harm to many others in Oregon besides Williams." J.A. 321a, 331a. The court rejected Philip Morris's claim of instructional error and reinstated the $79.5 million punitive damages. J.A. 327a-328a. The Oregon Supreme Court declined review.

This Court granted certiorari, vacated the judgment, and remanded in light of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). *Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003). On remand, the Oregon Court of Appeals carefully reviewed this Court's punitive damage decisions and reached the same result it did the first time. Pet. App. 36a. The Oregon Supreme Court affirmed, finding

that "Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware," as it had "put a significant number of victims at profound risk for an extended period of time." Pet. App. 33a. The court held that the punitive award "comported with due process" because Philip Morris's "massive, continuous, near-half century scheme to defraud the plaintiff and many others" constituted "extreme and outrageous circumstances." *Id.*

SUMMARY OF ARGUMENT

Philip Morris accumulated billions in profits from history's longest running and deadliest fraud. Before this Court, Philip Morris downplays the evidence of its egregious misconduct, but the evidence was overwhelming. It knew but denied that smoking caused lung cancer and knew but denied that nicotine was addictive. It disseminated its denials deliberately and widely, through statements and through surrogates, knowing that highly addicted smokers like Jesse Williams would cling to the denials and keep smoking. It knew that if its campaign of misrepresentation were ever exposed its sales would fall, its high profits crumble, and its liability exposure would be high. It hoped that its advertising and public-relations campaigns and scorched-earth litigation tactics would forestall public reckoning.

The jury in this case specifically found that the scheme ensnared a large number of Oregonians, including Jesse Williams, who died because of the trust he reposed in Philip Morris's web of lies. From the 1950s through the trial of this case in 1999, Philip Morris never conceded what it knew to be true - that smoking causes cancer and many of its customers would die. Philip Morris, still denying its underlying liability and thus showing no contrition, also argues that no one should have believed its 40 years of denials in a campaign that it congratulated itself was "brilliantly conceived and executed."

Instead, Philip Morris asks this Court to abandon its unwavering doctrine that States may consider not just the harm to individual plaintiffs but the actual and potential public effects of misconduct in order to deter its repetition. It urges this Court to treat review of punitive damage awards as a simple arithmetic exercise that it has always rejected. Philip Morris would have this Court treat the ratio between compensatory and punitive damages as the conclusive and overriding determinant of a constitutional punitive damage award. That approach should be resisted. It would downgrade the historic and traditional principle that punitive damages should be proportionate to the enormity of the offense, and it would undermine Oregon's right to use punitive damages to protect its consumers and its economy. It would gloss over the fact-sensitive inquiry that must be made in each case and ignore the many justifications that this Court and others have outlined that justify a higher award.

Due Process provides no shelter against a verdict that follows statutory criteria to achieve deterrence and permits a verdict that disgorges a defendant's ill-gotten profit is justified. The historical record, rather than support Philip Morris's arguments, confirms the validity of the broad public and retributive purposes of punitive damages that the Oregon legislature adopted and the state supreme court applied. Where a fraud is as monstrous as this one was in its willingness to put lives at risk for profit, strong medicine is required.

ARGUMENT

I. THE PUNITIVE DAMAGE ASSESSMENT IN THIS CASE ACCORDS WITH *BMW* AND *STATE FARM* AND SATISFIES DUE PROCESS

Both the Oregon Court of Appeals and the Oregon Supreme Court reviewed this case *de novo*, with a scrupulous eye toward this Court's decisions in *State Farm* and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). First in

BMW and then again in *State Farm*, this Court established standards for determining whether a punitive damage award is "grossly excessive" and thus violates Due Process. That inquiry must begin "with an identification of the state interests that a punitive award is designed to serve." *Id.* at 568. The reviewing court then considers three guideposts: reprehensibility, proportionality, and comparability. *Id.* at 575; *see also State Farm*, 538 U.S. at 418.

Philip Morris argues that the Oregon Supreme Court erred by allowing reprehensibility and comparability to override "ratio." Pet. Br. at 27. That argument fails for three reasons. First, it improperly denigrates the primary, important, and historic role that reprehensibility plays in both the assessment of punitive damages and the determination of their proportionality. Second, it utterly ignores a State's authority to determine when and to what extent, within constitutional limits, punitive damages may be levied. Finally, it makes the consideration of the punitive-to-compensatory damage ratio into the exclusive measure of constitutionality and the overriding guidepost regarding an award's reasonableness.

A. Precedent Supports the Oregon Decision

The Oregon Supreme Court's decision in this case conforms to this Court's precedents, as well as the principles derived from punitive damage history and practice. From its earliest antecedents to its most recent application, one constant has helped define the law of punitive damages: an appropriate punitive award reflects "'the enormity of the offense.'" *BMW*, 517 U.S. at 575 (1996) (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)). This Court has found *this* proportionality principle "'deeply rooted and frequently repeated in common law jurisprudence.'" *Id.* at 575 n.24 (citation omitted). *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) ("[t]raditional common-law approach . . . consider[s] the gravity of the wrong.").

B. Reprehensibility Is the "Most Important Indicium" of an Award's Reasonableness

This Court has incorporated this traditional approach into its modern excessiveness jurisprudence, repeatedly emphasizing that the "'most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" *State Farm*, 538 U.S. at 419 (citation omitted). *See also* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 387 (1994) ("The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages." (quoted in *BMW*, 517 U.S. at 575 n.23).[2] *BMW* made plain the primacy of reprehensibility reflected in a long line of precedent that focused on the enormity of the offense. *BMW*, 517 U.S. at 575 (citing *Day*).

Given that it is difficult to conceive misconduct more reprehensible than Philip Morris's, it is little wonder that the company gives short shrift to that guidepost, even though it properly "receives the heaviest weight." *Williams v. Kaufman County*, 352 F.3d 994, 1016 (5th Cir. 2003) (citation omitted). The Oregon Supreme Court did not depart from this Court's teachings when it treated reprehensibility as the preeminent determinant of an award's reasonableness.

The record supports that court's finding that "Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware," Pet. App. 33a, unlike the *State Farm* plaintiffs who produced "scant evidence of

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[2] Many courts applied this criterion before *BMW* and, indeed, before ratification of the Fourteenth Amendment in 1868. *See, e.g., Stimpson v. The Railroads*, 23 F. Cas. 103, 104 (1847)(No. 13,456)(Grier, Cir. J.); *Dibble v. Morris*, 26 Conn. 416, 1857 WL 969, at *9 (Conn. 1857); *Smith v. People*, 25 Ill. 17, 1860 WL 6489, at *3 (Ill. 1860); *Pike v. Dilling*, 48 Me. 539, 1861 WL 1691, at *3 (Me. 1861); *Phelin v. Kenderdine*, 20 Pa. 354, 1853 WL 6203, at *6-*7 (Pa. 1853); *Pickett v. Crook*, 20 Wis. 358, 1866 WL 2763, at *1 (Wis. 1866).

repeated misconduct of the sort that injured them." 538 U.S. at 423. This record overflows with repeated actions over a period of more than forty years of precisely the conduct that brought about Jesse Williams's death.

State Farm emphasizes that the excessiveness inquiry is a highly fact-sensitive undertaking. 538 U.S. at 425 ("The precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct."). *See also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437-38 (2001). A review of the evidence leads inexorably to the Oregon Supreme Court's conclusion that "Philip Morris's conduct was extraordinarily reprehensible." Pet. App. 23a. In fact, Philip Morris's misconduct is uniquely monstrous. It successfully schemed to derive enormous profits by taking advantage of the weakness of its addicted customers and knowingly created the deadliest and most preventable public health disaster in American history. *Id.* at 38a-41a; Tr. Vol. 11-A at 61-63.

C. Philip Morris's Fraud Dwarfs the Reprehensibility of the Misconduct Examined in this Court's Prior Cases

The misconduct reviewed by this Court in previous punitive-damage cases pales by comparison to the record here. Motivated by an appetite for profit that could not otherwise be sustained and deploying battalions of high-priced public relations, scientific, and legal talent, Philip Morris "spread false or misleading information to suggest to the public that doubts remained about [whether smoking caused serious and sometimes fatal disease]." Pet. App. 23a. The Oregon Supreme Court found that Philip Morris did so "deliberately . . . to keep smokers smoking, knowing that it was putting the smokers' health and lives at risk, and it continued to do so for nearly half a century." *Id.*

Philip Morris began this campaign[3] when it joined other cigarette companies in developing a united response to a 1952 *Reader's Digest* article that reported new research findings linking smoking with cancer. The article is credited with causing cigarette sales to fall for the first time in the twentieth century. J.A. 313a; Tr. Vol. 7-A at 109-10. To counter this trend, Philip Morris embarked on an elaborate public relations campaign to ensure that people continued to buy and smoke cigarettes. Pet. App. 3a.

The campaign began with the publication of "A Frank Statement to Cigarette Smokers." J.A. 318a. The "Frank Statement," which first appeared as an advertisement in 448 newspapers throughout the United States, *id.*, castigated "experiments with mice" as both inconclusive and subject to serious question by "eminent doctors and research scientists." J.A. 202a. Accepting an interest in their customer's "health as a basic responsibility, paramount to every other concern in our business," the "Frank Statement" asserted "the products we make are not injurious to health." J.A. 202a-03a. Instead, it contended that tobacco had a 300-year history of providing "solace, relaxation, and enjoyment to mankind" even though it has been accused of being "responsible for practically every disease of the human body." J.A. 203a. The "Frank Statement" reported that "[o]ne by one these charges have been abandoned for lack of evidence," as it suggested would be true of lung cancer. J.A. 203a. The "Frank Statement" also announced the establishment of the Tobacco Industry Research Committee (TIRC) (later renamed the Council for Tobacco Research (CTR)) to conduct research into "all phases of tobacco and

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[3] Undertaking the campaign seemed utterly natural to Philip Morris, whose early ads touted positive health effects for its cigarettes that were demonstrably false and caught the attention of the Federal Trade Commission. *See* Richard Kluger, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 131-32 (1997).

health," to be led by "a scientist of unimpeachable integrity and national repute." J.A. 203a.

The Frank Statement marked the beginning of Philip Morris's "common front" approach, involving the TIRC/CTR and nearly all members of the tobacco industry, an approach that used seemingly scientific pronouncements to foster doubt about the causal connection between smoking and disease.[4] J.A. 318a-319a & 62a-63a. The CTR was set up as a "front" and a "shield" for the industry on health questions. Pl. Ex. 104 at 2. Neither TIRC nor CTR ever actually conducted research on "all phases of tobacco and health," as had been promised. Instead, both focused on trying to discover plausible alternative explanations for the epidemic of lung cancer among smokers. J.A. 320a; 87a-89a; Pet. App. 38a. TIRC/CTR also provided expert witnesses and technical support for congressional hearings and litigation. Pl. Ex. 104 at 2.

D. Philip Morris Knew Smoking Caused Cancer

Cynicism dominated what Philip Morris did about its knowledge of its product's deadly effects. At a 1953 meeting of tobacco company executives, one official admitted, "It's fortunate for us that cigarettes are a habit they can't break." Pl. Ex. 1. In 1958, visiting British scientists talked with tobacco industry scientists, including two from Philip Morris, and of the 32 scientists in attendance, only one (not from Philip Morris) who was not convinced that "smoking causes lung cancer." Pl. Ex. 28 at 1-2. About the same time, Philip Morris research chief C. Mace penned a July 24, 1958

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[4] In *United States v. Philip Morris USA, Inc.*, Civ. Action No. 99-2496 (D.D.C. Aug. 17, 2006), *available at* http://coop.dcd.uscourts.gov/99-2496-082006a.pdf, the court found that Philip Morris paid about $200 million in support of this effort, including more than $189 million to fund the TIRC and its successors from 1954 to 1999, nearly $6 million for special projects from 1966 to 1990, and nearly $5 million for literature retrieval from 1971 to 1983. Slip op. at 36, ¶¶ 42, 43, 44.

memo acknowledging that the evidence "is building up that heavy cigarette smoking contributes to lung cancer either alone or in association with physical and physiological factors" and advocating that Philip Morris start producing safer cigarettes to get ahead of the public-health wave. J.A. 211a. The evidence is overwhelming that Philip Morris knew that "[s]moking causes lung cancer." *Id.*; Ex. 28 at 2.

Despite knowledge of its falsity, Philip Morris continued to make pronouncements similar to the "Frank Statement," including one by Vice President George Weissman that Philip Morris would "stop business tomorrow" if it thought that its product was harming smokers, and another by spokesman James Bowling that "there was no connection" between smoking and disease and that Philip Morris "wouldn't be in the business" if it thought there was. J.A. 318a, 205a, 208a-209a; Ex. 47, 161 at 1.[5]

In 1964, the U.S. Surgeon General issued a report that smoking contributed substantially to mortality rates from lung cancer and other diseases. Pl. Ex. 159. Philip Morris carefully and successfully plotted to blunt the impact of the report by issuing preemptive statements — that the press (including the Oregon newspapers) published — which spun the report as nothing new, tentative, unclear, and even supportive of the company's longstanding deception that more research was needed. J.A. 222a; Pl. Ex. 161.

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[5] Philip Morris often recited the "we'd stop business tomorrow" mantra. On January 24, 1972, the Wall Street Journal quoted Bowling, by then a vice president, saying: "[i]f our product is harmful . . . we'll stop making it. We now know enough that we can take anything out of our product." *United States v. Philip Morris*, Slip Op. at 306, ¶ 741. Bowling added, "[w]e don't know if smoking is harmful to health, and we think somebody ought to find out." *Id.* As late as 1997, Philip Morris's Chief Executive Officer stated, that cigarettes do not cause lung cancer, but if they did, "[I'd] probably . . . shut [the] company down instantly to get a better hold of things." *Id.* at 326, ¶ 806.

Afterwards, a Philip Morris vice president exalted that "press reflections are comparatively mild" and that "public reaction was not as severe nor did it have the emotional depth I might have feared." J.A. 221a. He added that "*we must in the near future . . . give smokers a psychological crutch and self-rationale to continue smoking.*" J.A. 222a; 319a (emphasis added). A new plan was then devised to insist that there was "no proof that smoking causes cancer," while offering "ready-made credible alternatives" that could be blamed for the incidence of cancer. J.A. 319a.

Philip Morris spared neither imagination nor expense in devising a continuous campaign to overcome public health warnings about the dangers of smoking. When its first-wave strategy of outright denial grew too threadbare, Philip Morris commissioned public opinion surveys to refine its message. It quickly found that "there are millions of people who would be receptive to a new message stating: Cigarette smoking may not be the health hazard that the anti-smoking people say it is because other alternative [explanations for lung cancer] are at least as possible." J.A. 242a (emphasis in original). Thus, Philip Morris attempted to divert the blame from smoking to "air pollution, viruses, food additives, occupational hazards and stresses." *Id.* Philip Morris also developed a plan to recruit a prestigious scientific panel to tell the public, officeholders, and opinion leaders that cancer was caused by everything but tobacco use. *Id.* at 242a-243a.

Philip Morris maintained this deceptive PR strategy throughout the 1970s, 1980s, and 1990s. J.A. 319a. Its "counter propaganda" was not limited to the relationship between smoking and health, however. Publicly, Philip Morris denied that the nicotine in cigarettes was addictive. J.A. 272a-274a. It falsely denied reports that it manipulated the nicotine content or delivery of cigarettes, J.A. 272a-273a, even though it had experimented with and successfully implemented methods for increasing nicotine content and facilitating delivery in cigarettes as early as 1960. J.A. 214a; 216a; 225a, 245a; Pl. Ex. 57 at 1, 58 at 1, 134 at 1, 139 at 1.

Privately, however, Philip Morris concluded that "no other rationale is adequate to sustain the habit [of smoking] in the absence of nicotine." Pl. Ex. 72 at 2. Philip Morris's research director best described the company's attitude, stating "the thing that we sell most is nicotine." J.A. 251a. Philip Morris used its research data that suggested that "a minimum concentration of nicotine is needed for the smoker's satisfaction" to its financial advantage by introducing lower tar and nicotine cigarettes. Pl. Ex. 57 at 1, 134 at 1, 139 at 1. As smokers switched to lower tar and nicotine cigarettes, Philip Morris knew they would increase their cigarette consumption to maintain their nicotine intake. Pl. Ex. 57 at 1.

Although as far back as 1959 it had identified "addiction" as one of the major reasons smokers smoke, Pl. Ex. 36 at 2, Philip Morris publicly denied the addictive properties of nicotine, even through this 1999 trial, because it believed "the entire matter of addiction is the most potent weapon a prosecuting attorney can have in the lung cancer/cigarette debate. We can't defend continued smoking as 'free choice' if the person was 'addicted.'" J.A. 253a.

Philip Morris now plays down the efficacy of its extraordinarily expensive investment in this unrelenting campaign[6] to nourish smokers' doubts about the truthfulness of public health messages against smoking, suggesting it was spending hundreds of millions for nothing and that Jesse Williams and other smokers should have seen through it. Pet. Br. at 41-42. That stance today contrasts tellingly with internal corporate documents that celebrated

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[6] Philip Morris's strategy for corporate survival was very successful, as it now boasts that it is the "nation's leading cigarette manufacturer and for more than 20 consecutive years has had the highest revenues, income, volume and market share among U.S. tobacco companies." http://www.philipmorrisusa.com/en/about_us/pmusa_at_a_glance.asp (last visited Sept. 9, 2006).

the company's efforts as a "brilliantly conceived and executed" public relations strategy to "defend itself" against public acceptance of the linkage between smoking and disease in "litigation, politics, and public opinion." J.A. 240a. It contrasts with corporate documents showing that Philip Morris knew its customers were physically and psychologically dependent on the nicotine in its products (J.A. 214a, 216a, 225a-226a; Pl. Ex. 36 at 2, 46, 52 at 2, 58 at 1, 72 at 2, 4, 8-9), that Philip Morris deliberately manipulated the quantity and delivery of nicotine to smokers to keep them hooked (J.A. 214a-215a, 216a-217a, 225-226a, 255a; Pl. Ex. 96 at 1), and that Philip Morris knew that at least 85% of its customers wished they never started smoking.[7] Pl. Ex. 128. It contrasts with internal memoranda that confidently proposed giving nicotine-dependent smokers a "psychological crutch and a self-rationale to continue smoking." J.A. 222a. It contrasts with the more aggressive strategy adopted in the early 1970s that utilized "strongly voiced opposition and criticism" to what they called the "exaggerations and lies of the anti-cigaret zealots." J.A. 238a. It contrasts with Philip Morris's repeated public statements, crafted at great expense, proclaiming that there was considerable scientific doubt about the relationship between smoking and disease. J.A. 222a; Pl. Ex. 161. As the Oregon Supreme Court noted, Philip Morris "would not spend over 40 years of time, effort and money to deceive people, unless it thought it was succeeding." Pet. App. 8a, n.1.

Indeed, the details of Philip Morris's campaign, which make up the record in this case, place the company's misconduct at the extreme end of the reprehensibility scale. Pet. App. 23a. Courts in other jurisdictions, reviewing a

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[7] Justice Breyer, relying on statistics from the Centers for Disease Control, once noted that "only 2.5% of smokers successfully stop smoking each year, even though 70% say they want to quit and 34% actually make an attempt to do so." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 191 (2000) (Breyer, J., dissenting).

similar record, have uniformly condemned Philip Morris's conduct. Quite recently, some seven years after the jury's punitive verdict in this case, Judge Kessler concluded that Philip Morris and other tobacco companies were in continuing violation of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Judge Kessler based that decision on the same conduct at issue here, finding that Philip Morris had

> survive[d] and profit[ed], from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community. . . . In short, Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.

United States v. Philip Morris USA, Inc., Slip Op., at 3-4. As another court put it, "'Philip Morris's conduct was in fact reprehensible in every sense of the word, both legal and moral.'" *Boeken v. Philip Morris, Inc.*, 26 Cal. Rptr.3d 638, 677 (Cal. App. 2d Dist. 2005) (quoting trial court with approval), *cert. denied*, 126 S.Ct. 1567 (2006).

Philip Morris's strategy worked as planned on thousands of smokers, including Jesse Williams, who seized the "crutch" the company offered and rationalized his addiction-driven urge to continue smoking. Tr. Vol. 9-B at 138, Vol. 11-B at 41; Pl. Ex. 159. By 1997, when Jesse Williams

lost his battle with lung cancer, Philip Morris had known for at least 40 years that cigarettes cause lung cancer and that millions of American smokers, about half of whom were its customers, were addicted to the nicotine in cigarettes. Pet. App. 3a, 5a; Pl. Ex. 36 at 2; Tr. Vol. 9-A at 131-40, 11-A at 61-63.

There can be no doubt that Philip Morris's longstanding fraudulent scheme was extremely successful. The company shipped 235 billion cigarettes and made a net profit of $1.6 billion the year that Jesse Williams died. Tr. Vol. 14-A at 49-50, 55. In 1996, when Jesse Williams was diagnosed with lung cancer, Philip Morris netted a $2 billion profit. *Id.* at 58. At the time of Jesse Williams's posthumous trial, Philip Morris had a net worth of more than $17 billion and held a 51% share of the domestic cigarette market. Pet. App. at 74a; Tr. Vol. 14-A at 57. It had a very high profit rate of 16.25% as a percentage of revenue for 1997. Tr. Vol. 14-A at 65-66.

E. Philip Morris's Misconduct Implicated at Least Four of the Aggravating Factors that Justify a Higher Award

To determine reprehensibility in any particular case, and thus the level of punishment and deterrence needed, this Court has instructed courts to consider the presence or absence of five aggravating factors, specifically whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419 (citations omitted).

These aggravating factors were generally absent in *State Farm* so that the harshest condemnation this Court could

muster for the defendant's conduct in that case was that it "merit[ed] no praise." *Id.* Here, at least four factors are unquestionably present, which weighs heavily in favor of the punitive damages award.[8] First, unlike *State Farm* and *BMW*, the harm here was not merely economic, but both physical and lethal, which by itself warrants a very substantial punitive damages award. *BMW*, 517 U.S. at 576.

Second, *State Farm* held that a defendant's indifference to or reckless disregard for the health or safety of others also supports a larger award. 538 U.S. at 419. Here, Philip Morris was not merely indifferent to its customers' health, but devised a 40-year campaign to deny the deadly and addictive effects of its products, in order to sustain its staggering profits. J.A. 317a-321a; Pet. App. 3a-6a. Its actions were more egregious and its profits much greater than in any other case on record, which heightens the reprehensibility of its misconduct far beyond any case this Court has considered.

Third, Philip Morris's misconduct was not an isolated lapse in an otherwise sterling history, but a carefully orchestrated, multi-decade deception, the sole purpose of which was to maintain its profits by convincing its still-living customers to continue to smoke and make others feel its was safe to take up smoking. Pet. App. 3a-6a.

Finally, Philip Morris's wrongdoing was much more than mere accident or misadventure. It was corporate policy maintained over decades by large numbers of top executives and their successors at a cost of hundreds of millions of dollars. Messages known to be false were carefully crafted and expertly disseminated through mass media to millions of customers and prospective customers.[9]

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[8] *See* Brief *Amici Curiae* of the Campaign for Tobacco-Free Kids, American Cancer Society, *et al.*, at 5-29.

[9] Philip Morris's misconduct arguably implicated *State Farm's* fifth

Reprehensibility is not a number. It is not enough to say whether all the reprehensibility factors are or are not met. Misconduct causing minor physical injury is not as reprehensible as misconduct causing death. Even "repeated" misconduct can be minor compared with a nationwide fraudulent scheme spanning four decades. The rules for deciding whether a punitive award is "grossly excessive" must allow for punishment and deterrence where misconduct is so monstrously and, one hopes, uniquely reprehensible as it is in this case.

Philip Morris knew that its conduct killed its customers, knew that many of them were physically addicted and financially vulnerable, and knew that, if its actions were discovered, it would justify substantial punitive damages. Philip Morris's misconduct was exponentially more egregious than what happened in *BMW* and *State Farm*.

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factor, too, despite the fact that the Oregon Supreme Court said there was "no evidence that Williams was especially financially vulnerable." Pet. App. 24a. The evidence established that Williams had retired as a public school janitor, which indicates that he likely did not have a large income during his working life or a large pension afterwards. That the economic damages were only $21,485.80 (all of which were medical expenses) also supports the assertion that he was financially vulnerable. Moreover, it is beyond dispute that the many Oregonians that Philip Morris targeted in perpetrating this fraud were people of modest means for whom the purchase of cigarettes was a major weekly expense. More important on the facts of this case, Jesse Williams, like many other smokers, was "highly addicted" to cigarettes. Tr. Vol. 4B at 20. He was therefore *physically* vulnerable to defendant's fraudulent campaign, and that vulnerability was a crucial link in the campaign itself. Pl. Ex. 1 ("It's fortunate for us that cigarettes are a habit they can't break."). Further, that vulnerability was not just incidental but was created by defendant's product itself. J.A. 229a ("[T]he primary motivation for smoking is to obtain the pharmacological effect of nicotine.").

F. Jesse Williams and Many Others Were Victims of Philip Morris's Fraud

Philip Morris still denies that Jesse Williams[10] — or anyone else, for that matter — received and relied upon thousands of misrepresentations churned out by its multi-million dollar campaign. Pet. Br. at 3. The jury rejected this contention, specifically finding that Philip Morris made "false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied" and that the "false representations and reliance" were a cause of his death. J.A. 290a. The Seventh Amendment's Reexamination Clause requires due deference to this finding. *See Cooper Indus.*, 532 U.S. at 439 n.12 ("[n]othing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings.").

Indeed, Williams's wife, Mayola, testified that he told her that he had heard statements on television that "tobacco doesn't cause you cancer," showed her written materials that rebutted her pleas to quit, and, agreed with "the tobacco company," line that "everything is causing cancer."). *See, e.g.*, J.A. 129a-130a, 132a-133a, 138a, 148a-149a.

Although Philip Morris argues that there was insufficient evidence that Williams relied on any specific misrepresentation, this is not unexpected in light of the facts that he was dead and unable to testify, that the family arguments about smoking were so tense that they were often cut short when they could not be avoided altogether, that Mayola had no reason to preserve the articles and materials he used in rebuttal over the years, and that Philip Morris's fraudulent campaign was frequently advanced

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[10] Before the Court of Appeals, Philip Morris argued that only "a subset of Oregon smokers" were potentially affected by its misrepresentation, but "the record contains evidence of only one such smoker — Jesse Williams." J.A. 305a.

through surrogates and on broadcasts or by the use of its advertising power to plant or change stories and slant editorials in seemingly neutral publications. J.A. 320a; Tr. Vol. 7-B at 34-35, 39.

Philip Morris witness Glenn May testified he had reviewed every publication that Jesse Williams could have read about smoking and health and identified a three-inch stack of articles from the Oregonian, a publication Williams read, that contained denials of tobacco's dangers and addictive qualities. *See* Tr. Vol. 15-B at 73; Pl. Ex. 175 (consisting of those articles). The Court of Appeals, after reviewing the record, concluded that "[t]here is evidence that Williams received the message that the defendant intended to communicate and that the message affected his decision to continue smoking and not to make more serious efforts to overcome his addiction to cigarettes." J.A. 321a.

Perhaps the most telling evidence regarding Jesse's knowledge of and belief in Philip Morris's message was the sense of betrayal he expressed when told he had lung cancer: "those darn cigarette people finally did it. They were lying all the time." J.A.149a.

Just as Jesse was likely to see Philip Morris's misrepresentations, which was Philip Morris's design, so were thousands of other Oregonians. In fact, Philip Morris conceded as much in its brief seeking a reduction of punitive damages in the trial court by stating that its scheme "affected an undetermined (but surely relatively small) number of people such as Jesse Williams." J.A. 297a. It further argued against comparing these punitive damages with those awarded in California because "any award in this case for Oregon harms should be proportionately smaller" for "California is approximately ten times the size of Oregon." J.A. 298a.

The Court of Appeals found:

> there is evidence concerning other Oregon victims of defendant's decades-long

> fraudulent scheme. The tobacco industry and defendant directed the same conduct toward thousands of smokers in Oregon. They all received the same representations, from the same entities, and through the same media, and the industry intended to induce Oregon smokers to act on those representations in the same way. That conduct was a fundamental part of defendant's business strategy; Williams was simply one of its many Oregon victims.

Pet. App. 66a.

Philip Morris's reprehensible misconduct was conducted on a scale that affected Jesse Williams and significant numbers of Oregonians. In stark contrast to the record in *State Farm*, there was ample evidence of the "adverse effect on the state's general population." 538 U.S. at 427. The unprecedented scope, length, lethality, and profitability of that misconduct fully supports this award.

II. A State's Use of Punitive Damages to Deter Misconduct Does Not Offend Due Process

This Court "'accord[s] substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (citation omitted), and has repeatedly recognized that "[s]tates necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Id. See also State Farm*, 538 U.S. at 422 (each state "may make its own reasoned judgment" about the scope and measure of punitive damages).

States have treated punitive damages in varying ways, with five states barring them for all or most claims[11] and others imposing limits on their amounts.[12] Still others, like Oregon, have chosen to punish and deter egregious misconduct in sums large enough to effectively deter others. Due Process does not prohibit any of these state policy preferences.

In order to answer what this Court called the first inquiry in determining whether punitive damages are excessive, it is appropriate to examine the statutory factors that define the State's interest in light of the facts adduced in the record. Before punitive damages may be pleaded in Oregon, a plaintiff must produce admissible evidence sufficient to make a jury case that the defendant "acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has *acted with a conscious indifference to the health, safety and welfare of others.*" OR. REV. STAT. §§ 31.725(3), 31.730 (emphasis added). Plaintiff cannot seek discovery of the defendant's financial condition until the court grants a motion to amend the complaint to add the punitive damage claim. *Id.* at § 31.725(6). At trial, plaintiff must prove his case for punitive damages by "clear and convincing evidence," and the jury is instructed on that requirement. *Id.* at § 31.730(1). In addition, the jury is instructed on the factors considered in assessing punitive damages, including the likelihood of harm, defendant's awareness of that likelihood, the "profitability of the defendant's misconduct," the duration and concealment of the misconduct, defendant's response to discovery of the misconduct, the defendant's financial condition, and the "total deterrent effect of other

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[11] *See* Amicus Br. of Am. Tort Reform Ass'n (ATRA), at 8 n.5.

[12] *See BMW*, 517 U.S., at 614-619 (Ginsburg, J., dissenting). Since then, a number of additional states have capped punitive damages. *See Cooper Indus.*, 532 U.S. at 433 n.6.

punishment imposed upon the defendant as a result of the misconduct."[13] OR. REV. STAT. § 30.925(2).

Both the trial court and reviewing courts consider whether the verdict is supported by the "rational juror" test. *Id.* at § 31.730(2). In addition to this mandatory review, the trial court may reduce the jury's award if the defendant shows it has taken remedial measures to guard against future misconduct or prior punitive damages assessed against defendant were assessed for the same misconduct. *Id.* at § 31.730(3). Still further review occurs as required under *Cooper Indus.* These very substantial procedural and substantive statutory requirements constrain a jury's award of punitive damages and suggest that the award in this case should be accorded the deference due a properly rendered state court verdict.

Significantly, under Oregon's statutory scheme, juries and courts must consider both the profit the defendant derived from its misconduct and whether "total deterrent effect" has yet been achieved. OR. REV. STAT. § 30.925(2). These factors are consistent with the goal of deterrence. Law and economics scholars argue that optimal deterrence is only achieved when the punitive damages increase as the probability that a defendant's wrongdoing will be detected decreases. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 890 (1998). *See also Amicus* Br. of Keith N. Hylton, *et al.* Where, as here, a hidden fraudulent scheme took place over four decades, defrauding Oregon consumers and ruining their health, Oregon's interest in deterrence must be regarded as being at its apogee. Law and economics principles also emphasize that it is both appropriate and

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[13] As part of its concern with changing conduct, Oregon allows a court, upon defendant's motion, to reduce the punitive damages when the defendant has taken appropriate remedial measures to prevent the misconduct's reoccurrence. OR. REV. STAT. § 31.730(3).

essential to deny a defendant its ill-gotten gains through disgorgement. *See* Dan B. Dobbs, *Ending Punishment in Punitive Damages: Deterrence – Measured Remedies*, 40 ALA. L. REV. 831, 866 (1989).

A. Deterrence Would Not Be Adequately Served by a Lower Award

In contrast, the approach Philip Morris advocates would foreclose Oregon's emphasis on deterrence and guarantee a regime of underdeterrence, in which the punitive damages collected will always be less than the harm inflicted and the profits derived. If only one in one hundred victims brings such a lawsuit, then a higher award for deterrence purposes is both sensible and fair. *See Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677-78 (7th Cir. 2003)(Posner J.). *See also, Hopkins v. Atl. & St. Lawrence RR.*, 36 N.H. 9 (1857) (there is no deterrence when a defendant knows few will sue and uses its wealth to assure that result).

Due Process does not bar Oregon from focusing on profits in order to "protect[] its own consumers and its own economy." *BMW*, 517 U.S. at 572. Paraphrasing Justice Holmes, this Court has acknowledged that the "Constitution does not require the States to subscribe to any particular economic theory." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987).

Philip Morris suggests to this Court that it has been sufficiently deterred and that no punitive damages should be assessed against it at all. Pet. Br. at 9, 34, and 40 (arguing in favor of a zero ratio). It also argues that monies paid in the Master Tobacco Settlement, resulting from state lawsuits seeking restitution for health care expenditures made for tobacco-related diseases, provides all the deterrence needed to serve Oregon's interest. Pet. Br. at 40. These arguments should be rejected.

B. Deterrence of a Profitable Fraud Requires Strong Medicine

This Court has recognized that repeated instances of profitable but wrongful misconduct demonstrate that "strong medicine is required" to deter further repetition. *BMW*, 517 U.S. at 577. A decision that this misconduct merits no or relatively little punitive liability would send an anti-deterrence message to other companies: there is a green light on profitable fraud, you *may* lose little of that profit at most, and, if you feign contrition, you may keep it all.

Philip Morris has not been deterred by longstanding government regulation of its industry or the Master Tobacco Settlement (MSA). In fact, a federal district court recently found some aspects of the same underlying fraud in this case continue to this day, in violation of the federal RICO statute in an action brought by the U.S. Justice Department. *U.S. v. Philip Morris USA*. The court in that case lamented the fact that the U.S. government could not obtain disgorgement as a remedy. Slip op. at 1624. That Philip Morris and its tobacco *amici* (*see Amicus* Br. of R.J. Reynolds Tobacco Co. *et al.*, at 8-10) continue to protest that they should not be held liable at all for their multi-decade fraud. Pet. Br. At 41. Deterrence is plainly still needed.

Moreover, a punitive damage award must be "'not only a punishment sufficient to deter similar conduct on the part of the particular tortfeasor,' but 'must also be sufficient to deter others.'" *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373, 378 (8th Cir. 1993)(citation omitted), *cert. denied*, 511 U.S. 1115 (1994).[14]

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[14] *See alsoUnion Pacific R.R. Co. v. Barber*, 356 Ark. 268, 300, 149 S.W.3d 325, 346 (Ark. 2004)("It is important that the punitive damages be sufficient to deter others from comparable conduct in the future."); *Gober v. Ralphs Grocery Co.*, 137 Cal.App.4th 204, *223, 40 Cal.Rptr.3d 92, 107-08 (Cal. App. 2006); *Burns v. Prudential Securities, Inc.*, __ N.E.2d __, 2006 WL 1891829, at *32 (Ohio App. 2006); *Casumpang v. Int'l Longshore &*

In fact, an award's impact on others explains why punitive damages were often referred to as "exemplary" damages. *See, e.g.*, Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 715 (1957). Professor Owen explained, "By punishing intentional law-breakers, society restores all its members to a position of equal worth, and reinforces the confidence of law-abiders in the basic fairness of the legal system and in the utility of their personal decisions to obey the law." Owen, 39 VILL. L. REV. at 376 (footnotes omitted).

C. The Master Settlement Has No Impact on this Award

No effect on this award should be derived from the Master Settlement Agreement between tobacco companies and state attorneys general. By its own terms, the MSA limits its import. First, it provides that "no part of any payment under this Agreement is made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages." MSA, § XVIII (d), at 105 (available at http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf). Second, the MSA provides that neither the agreement nor any public statements about it "shall be offered or received in evidence in any action or proceeding for any purpose other than in an action or proceeding arising under or relating to this Agreement." MSA, § XVIII (f), at 106.

Finally, even if the MSA itself did not bar its use for the purpose the company now proposes, Philip Morris took the position at the trial court that the only relevance of the MSA is as an offset to "the State of Oregon's portion of the punitive damages verdict and judgment in this case," a reference to the 60% of any punitive damage award due to

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Warehouse Union, Local 142, 411 F.Supp.2d 1201, 1221-22 (D. Hawai'i, 2005); *Baker v. John Morrell & Co.*, 266 F.Supp.2d 909, 961 (N.D.Iowa, 2003).

be paid into the state crime victim's fund pursuant to OR. REV. STAT. § 31.735(1)(b). J.A. 292a. The MSA does not affect the amount of punitive damages justified in this case.

III. RELIANCE ON A STRICT MATHEMATICAL FORMULA WOULD VITIATE DETERRENCE

The jury's punitive assessment in this case was not the product of bias or whim. Rather it reflected an understanding of the enormity of Philip Morris's offense and the need for punitive damages sufficiently large to counter the economic imperative that drove the company to maintain its incredibly expensive but even more lucrative fraud. Although Philip Morris complains about the primacy the Oregon courts gave the reprehensibility guidepost, Pet. Br. at 27, the formula it urges would make the ratio between punitive and compensatory damages the conclusive and overriding determinant of the reasonableness of any award. If this Court were to endorse a flat ratio approach for all cases, regardless of the facts, it would enable tortfeasors to project which frauds and other offenses would remain cost-effective and thereby enfeeble the traditional deterrent function of punitive damages.

This Court has rejected these entreaties before and repeatedly, categorically, and wisely rejected the mathematical bright-line straitjacket that Philip Morris prefers. *Haslip*, 499 U.S. at 18 ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable."). *Accord TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1991); *BMW*, at 582 & 585; *Cooper*, at 434-35; *State Farm*, at 424-25. This Court's *BMW* and *State Farm* decisions defined a process of judicial review, not an exercise in elementary arithmetic. The facts in this case dramatically demonstrate why this Court should not retreat from those holdings and legislate a fixed formula for punitive damages.

Responding to an argument like Philip Morris makes here that an immutable ratio should define the upper limit

of a punitive award, Judge Richard Posner wrote: "The Supreme Court did not, however, lay down a 4-to-1 or single-digit-ratio rule . . . and it would be unreasonable to do so." *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003). Similarly, as the Fifth Circuit described it, the ratio "factor does not impose a mathematical formula for constitutional proportionality, but instead only embodies 'a general concern of reasonableness.'" *Kaufman County*, 352 F.3d at 1016 (quoting *BMW*, 517 U.S. at 582-83.).

A. The Compensatory Damages in this Case Provide a Poor Denominator for any Ratio Analysis

The slavish adherence to ratios favored by Philip Morris is problematic for many reasons. As Professor Priest observed, such a ratio approach can have the anomalous effect of multiplying compensatory damages for less blameworthy conduct that caused a huge loss, while underestimating punitive damages in truly "repugnant and reprehensible actions [that] generate little harm." George Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 838 (1996).[15]

A ratio is no talisman. *See TXO*, 509 U.S. at 467 (Kennedy, J., concurring). This Court has recognized that treating punitive damages as a simple reflection of the relationship between actual and punitive damages fails to account for fact-sensitive considerations and, most especially, potential harm to those who just as easily could

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15 *See also* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 30 n.140 (1982) ("[a]ctual harm that occurred is at best a crude measure of the moral egregiousness of a defendant's conduct and, hence, of the punishment deserved. If degrees of egregiousness were ranked along a scale ranging from accidental 'acts of God' through negligence to deliberately injurious acts, one would not expect to find any correlation between egregiousness and the gravity of the injury sustained by an individual plaintiff. Death, disabling physical injury, or substantial economic loss may result from acts that fall at any point on the egregiousness scale.").

have been victims of the defendant's misconduct. *Id.* at 460. *See also BMW*, 517 U.S. at 585. As such, this Court's reluctance to adopt a mathematical bright-line reflects a proper understanding that a rigid rule would actually undermine the punishment and deterrent effect of punitive damages, making punitive damages a minor cost of doing business.

In *State Farm*, this Court articulated at least four *non-exclusive* examples of conduct that merits punitive damages higher than a single-digit ratio:

1) where "'a particularly egregious act has resulted in only a small amount of economic damages,'" 538 U.S. at 425 (citation omitted);

2) where "'the injury is hard to detect,'" *Id.* (citation omitted);

3) where "the monetary value of noneconomic harm might have been difficult to determine," *Id.* (citation omitted);

4) where the defendant is a recidivist who has engaged in "repeated misconduct of the sort that injured [plaintiffs]." *Id.* at 423.

Other courts have added to this list:

5) where the misconduct is lucrative or potentially so, *Mathias*, 347 F.3d at 676;

6) where wealth enables "the defendant to mount an extremely aggressive defense . . . [and] by doing so to make[s] litigating against it very costly," *Id.* at 677;

7) where a larger ratio is necessary to motivate the prosecution of a meritorious claim; *Gavin v. AT&T, Inc.*, ___ F.3d ___, No. 05-4398, 2006 WL 2548238, at *6 (7th Cir. Sep't 6, 2006); and,

8) where the misconduct is extremely reprehensible. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004).

Each of these justifications is present in this case. First, economic damages in this case amounted to $21,485, an extremely insubstantial figure for a death. Although $800,000 was awarded for noneconomic damages, a wrongful death cap reduced that number to $500,000. These damages do not amount to the type of "complete compensation" that *State Farm* suggested was necessary to justify a reduction in the award. 538 U.S. at 426. The incompleteness of the damages is magnified by limitations on recoveries in wrongful death. This Court has recognized that "death is different," and rules that may be sensible in some contexts may not apply when human life is at stake or the value of a life is being assessed. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 994 (1991)(collecting cases).

This case highlights why a ratio regime is particularly problematic in wrongful death cases. Oregon's statutory cause of action for wrongful death does not purport to determine the value of the life taken. Under its wrongful death statute, compensatory damages are based on the monetary losses of the decedent's family, such as medical bills, burial costs, and loss of the decedent's economic contribution to the family.[16] OR. REV. STAT. § 30.020. Thus, the amount of compensatory damages awarded in wrongful death cases do not purport to represent the actual extent of harm caused by the defendant, but merely a portion of the monetary loss to the surviving family. The result is a "systematic underestimation of damages." William M.

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[16] By statute, the surviving spouse and children are also entitled to noneconomic damages for loss of the "society, companionship and services of the decedent." OR. REV. STAT. § 30.020(2)(d). That recovery, however, is limited to a maximum of $500,000 regardless of the amount the jury determines is necessary to compensate them for those losses and regardless of the number of survivors. OR. REV. STAT. § 18.560.

Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF TORT LAW 187 (1987).[17]

Second, the difficulty of measuring the noneconomic harm in wrongful death cases provides further justification for making this case one in which ratios are less instructive. *Compare State Farm*, 538 U.S. at 425 (justifying punitive damage amounts above single-digit ratios where "the monetary value of the noneconomic harm" is "difficult to determine."). As Professor Ellis observed, "[w]rongful death is an area of the law in which the measurement of loss in pecuniary terms presents intractable difficulties." Ellis, 56 S. CAL. L. REV. at 30 n.140. *See also* Michael L. Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 64 (1992) (finding punitive damages necessary to "offset the victim's estate for the lack of compensatory damages received" in wrongful death cases).

Third, fraud is by definition a form of misconduct that is hard to detect. Here, the latent quality of the disease compounded the difficulty in discovering the fraud. Only upon diagnosis, shortly before Williams died, was the fraudulent nature of Philip Morris's enterprise revealed.

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[17] The leading law and economics scholars uniformly agree that "systematic underdeterrence" is likely in wrongful death cases because of the focus on survivors' losses and not the value of the life lost. Polinsky & Shavell, 111 HARV. L. REV. at 941-42; W. Kip Viscusi, *The Social Costs of Punitive Damages*, 87 GEO. L.J. 285, 334 (1998); David S. Haddock, *et al.*, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 44 (1990); Lloyd R. Cohen, *Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action*, 34 EMORY L.J. 295, 331 (1985). *See also Neal v. Farmers Ins. Exch.*, 582 P.2d 980, 992 (Cal. Ct. App. 1978) (acknowledging limitations imposed by wrongful death statutes in matter in which plaintiff died before trial and that otherwise a more substantial compensation would have been recovered, justifying a larger award).

Fourth, this case presents an extreme form of repeated misconduct, inventively renewed and stretched over decades.

Fifth, misconduct motivated by financial gain often requires different considerations than wanton or reckless misconduct. A successful deterrence regime requires that at least some measure of defendant's ill-gotten financial gains be disgorged. *Compare Gilchrist v. Perl*, 387 N.W.2d 412, 416 (Minn. 1986) (recognizing punitive aspect of disgorgement remedy). To achieve optimal deterrence, the profitability of the misconduct must be considered.[18] Dobbs, 40 ALA. L. REV. at 866. Punitive damages that disgorge "ill-gotten profits serve[] to deter future similar conduct by eliminating any profit incentive." *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1081 (Ariz. 1987).

One commentator has found that "[a]t least fifteen states direct the trier of fact to consider profitability." Rachel M. Janutis, *Reforming Reprehensibility: The Continued Viability of Multiple Punitive Damages after State Farm v. Campbell*, 41 SAN DIEGO L. REV. 1465, 1474 n.29 (2004)(citing examples). She also found "[a]t least five states direct a reviewing court to consider the profitability of defendant's misconduct." *Id.* Oregon is one of them. OR. REV. STAT. §§ 30.925(2) (factor for jury); 31.730(2) (reviewing court).

In *Haslip*, this Court endorsed consideration of "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss" because "[t]he application of these standards . . . imposes a sufficiently definite and

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[18] Both the National Conference of Commissions on Uniform State Laws ("NCCUSL") and the Reporters of the American Law Institute ("ALI") recommend that punitive damages for corporate misconduct be tied to profits. *See* NCCUSL, MODEL PUNITIVE DAMAGES ACT, § 7, 14 U.L.A. 124 (Supp. 2003)(approved in 1996); and ALI, REPORTER'S STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 254-55 (1991).

meaningful constraint on the [factfinders'] discretion." 499 U.S. at 22. *See also BMW*, 517 U.S. at 566. Moreover, *Cooper Indus.* expressed no constitutional concern in considering profit in applying the disparity guideline. 532 U.S. at 442.

B. The Profits Derived from this Fraud Require Special Consideration

In this case, Philip Morris's campaign added enormous economic value and collateral benefits to the company. The fraud that helped Williams keep smoking was the cornerstone of the industry's survival strategy for more than 40 years, yielding a staggering 16.25% profit as a percentage of revenue for 1997. Tr. Vol. 14-A at 65-66. It staved off a rapid decline in customers, kept customers smoking while reassuring beginners who then became regular, addicted customers, and reaped enormous profits.

The punitive award in this case hardly approaches Philip Morris's profits, which were more than $2 billion in 1996, the year Williams was diagnosed with lung cancer, and $1.6 billion in 1997, the year Williams died. Tr. Vol. 14A at 55. The $79.5 million awarded represented just two-and-a-half weeks' domestic profit to Philip Morris in 1997. J.A. 336a.

Massachusetts's highest court has adopted the usual formulation with respect to profitability: one criterion for evaluating a punitive damage award "is removal of the profit of an illegal activity [sufficiently large to] be in excess of it so that the defendant recognizes a loss." *Labonte v. Hutchins & Wheeler*, 678 N.E.2d 853, 862 (Mass. 1997).[19]

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[19] *Accord Alexander v. Meduna*, 47 P.3d 206, 219 (Wyo. 2002). *See also Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 460 (Wis. 1980); *Cox v. Stolworthy*, 496 P.2d 682, 690 (Idaho 1972). *Compare* Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 166 (J.H. Burns ed. 1996) (1781) ("the value of the punishment must not be less, in any case, than what is sufficient to outweigh that of the profit of the offence.").

If, however, the assessment of a defendant's profitability were limited to the profit made from an individual plaintiff, underdeterrence would be the inevitable result. Such an atomistic approach to a massive multi-decade fraud utterly undermines the punishment and deterrence rationales for punitive damages and makes them instead part of a business calculus, one in which the public safety will lose time and again. *See Ramirez v. IBP, Inc.*, 950 F. Supp. 1074 (D. Kan. 1996) (citation omitted) ("evaluation of profit is not limited to the particular transaction or incident on which the suit was brought. Rather, it 'involves looking at the defendant's profit from the course of conduct giving rise to the plaintiff's injuries.'").

As Professor Galligan has written, "a rational profit-maximizing actor" considers only those costs it is likely to have to pay and not those it would "never have to pay." Thomas C. Galligan, Jr., *Disaggregating More-than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117, 129 (2003). Thus, when wealth achieved through the very misconduct that merits punitive damages is used to make it difficult to litigate against that defendant, a higher award is not only justified but imperative to vindicate society's interest in deterrence. *See Mathias*, 347 F.3d at 676-77.

In this case, an unrepentant Philip Morris has actually bragged about its successful litigation record and forecasts that it will never have to pay compensation, let alone, punitive damages to other Oregon victims of its fraud. Pet. Br. at 12-13. Yet, their success reflects the use of their far superior financial power to defeat tobacco cases by attrition[20] rather than on the merits, as is well-documented.[21]

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[20] *See, e.g. Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 420-21 (D.N.J. 1993) (calling the strategy employed by tobacco companies "a battle of attrition [in which] the plaintiff will always run out of

Given these litigation tactics that make use of the wealth accumulated by this fraud, a single plaintiff[22] can scarcely afford the cost of protracted and expensive litigation that requires proof of an industry-wide, national fraudulent scheme without insisting on punitive damages that punish wrongdoers for their broader in-state public harm. The "difficulty of detection and less than full enforcement . . . provide strong justifications for efficiency-driven increased or augmented awards." Galligan, 71 TENN. L. REV. at 121.

Here, defendant's misconduct eclipses "particularly egregious" and has resulted in damage that is extremely difficult to assess in monetary terms. That misconduct has not only been repeated, it is an ongoing scheme lasting more than 40 years. That scheme has produced profits beyond most investors' highest expectations, and those profits have enabled Philip Morris to resist justice in the courts by application of sheer economic firepower. All of these factors, in addition to the extreme reprehensibility of Philip Morris's misconduct suggest that this is a case in which a single-digit ratio of punitive to compensatory damages should not be applied and that the jury's punitive damage verdict is not grossly excessive. The award should be upheld.

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ammunition before the Defendants even begin to notice a diminution of their resources.").

[21] Plaintiff directs the Court to the *amicus curiae* briefs filed by Trial Lawyers for Public Justice and the Tobacco Control Legal Consortium for examples of the litigation tactics employed by Philip Morris and the industry to stave off liability and make it too expensive for plaintiffs to pursue cases. *See also* Sara D. Guardino & Richard A. Daynard, *Punishing Tobacco Industry Misconduct: The Case for Exceeding a Single Digit Ratio Between Punitive and Compensatory Damages*, 67 U. PITT. L. REV. 1 (2005).

[22] Tobacco litigation has generally not been found to qualify for class-action treatment, either because individual causation issues predominate or because separate adjudications would not be dispositive of others' interests. *See, e.g., In re Simon II Litig.*, 407 F.3d 125 (2nd Cir. 2003); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Engle v. Liggett Group, Inc.*, __ So.2d __, 2006 WL 1843363 (Fla. Jul. 06, 2006).

IV. Due Process Does Not Prohibit Consideration of Harm to Non-Parties

Though it was hardly the exclusive consideration that the Oregon Supreme Court used to uphold the size of the jury's verdict in this case,[23] the court did describe the full impact of Philip Morris's misconduct on others in Oregon, noting that "Philip Morris does not contest how the Court of Appeals summarized the record." Pet. App. 8a n.1. That record summary stated that Philip Morris's "'public relations campaign had precisely the effect that [Philip Morris] intended it to have and that it affected large numbers of tobacco consumers in Oregon other than Williams . . . [and] caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but non-fatal health problems with their attendant economic consequences.'" *Id.* at 7a-8a (quoting Court of Appeals).

Philip Morris conflates that consideration of total harm within Oregon and the enormity of the offense with punishment for the thousands of Oregonians also defrauded. The two are not the same. As the California Supreme Court recently acknowledged, "[t]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others." *Johnson v. Ford Motor Co.*, 113 P.3d 82, 92 n.6 (Cal. 2005). Doing so does not conflict with this Court's precedents, which hold that a constitutionally valid award is one "supported by the State's interest in protecting its own consumers and its own economy." *BMW*, 517 U.S. at 572.

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[23] The Court found four of the five aggravating factors of reprehensibility present, Pet. App. at 23a, found that the potential harm, not represented by the small economic damages, was great, *id.* at 29a, and found "extreme" reprehensibility. *Id.* at 33a. All of these support the verdict.

Under that criteria, the Oregon courts did not err and this award is entirely justified.

Rather than mandate an atomistic approach to punitive damages, the cases endorse a precisely focused consideration of the misconduct that is properly measured by the breadth of its effect. While that may include an acknowledgement that others have been or potentially would have been harmed by the misconduct, it does not mean that the allotted punishment was calculated to include punishment for unproven harms visited upon other Oregonians.

Neither history nor this Court's recent precedents require that a State forego this type of consideration of the impact of an egregiously wrongful course of conduct on persons within the State who are not parties to the action.[24] Contrary to the revisionist history that Philip Morris and its *amici* have supplied to this Court,[25] punitive damages traditionally have not been restricted to a compensatory purpose that is blind to the injuries caused others who might have the same claim. Instead, decision after decision before and after the ratification of the Fourteenth Amendment have discussed the broader public purposes served by punitive damages, purposes that Philip Morris

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[24] *See also Fritzmeier v. Krause Gentle Corp.*, 669 N.W. 699, 710 (S.D. 2003) (appropriate to consider not only "the defendant's actions as it related to potential harm that may be inflicted on not only the present victim, but also other victims if it was not deterred"); *Planned Parenthood of Columbia, Inc. v. Am. Coal. Life Activists*, 300 F. Supp. 2d 1055, 1060 & n.3 (D. Wash. 2004); *Durham v. Vinson*, 602 S.E.2d 760, 766 n.6 (S.C. 2004); *Myers v. Workmen's Auto Ins. Co.*, 95 P.3d 977, 991 (Idaho 2004).

[25] Philip Morris has supplemented its own treatment of history by referring the Court to the ATRA *amicus* brief, which purports to be an extensive treatment of the same history. That brief throws down the gauntlet by asserting that "not one case" prior to 1870 approved an award that "reflected harm to parties not before the court." ATRA Br. at 2, 16. Plaintiff has attached an Appendix to this brief detailing the large number of cases that ATRA overlooked.

would deny. Although misconduct that injured many in the same way and gave rise to the same cause of action was rare, courts did not hesitate to award punitive damages based on the entire harm that was or could have been caused. Nor has any of this Court's recent punitive-damage jurisprudence denied a State the authority to punish a defendant's entire course of misconduct, including in its assessment the adverse effects on the consumers and the State's economy.

A. History Teaches that Punitive Damages Vindicate Society's Interests in Deterring and Punishing Dangerous and Fraudulent Misconduct

Philip Morris and *amicus* ATRA advance a radically revisionist view of history, arguing that cases that predate the 14th Amendment's ratification in 1868 demonstrate that Due Process forbids awarding punitive damages for a mass tortfeasor's entire course of conduct, including its actual and potential effects on non-parties.[26]

Remarkably, in pressing these arguments, Philip Morris and ATRA cite few cases before 1868.[27] A careful review of pre-ratification caselaw (partially summarized in the attached Appendix), undercuts rather than supports defendant's claims. The cases make plain that by 1868 this Court and the vast majority of state appellate courts had concluded that punitive damages served the public's

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[26] Reliance on history is appropriate because, 1868 marks the "crucial time" for assessing whether a particular practice accorded with Due Process. *Burnham v. Sup. Ct. of Calif.*, 495 U.S. 604, 611 (1990); ATRA Br. at 4.

[27] Philip Morris cites a few such cases, Pet. Br. at 18, 19, 36, relying instead primarily on ATRA, *id.* at 19, n.7, and the latter's claim that its ostensibly exhaustive search of pre-ratification cases "reveals *not a single instance* in which a court approved a punitive damages awards that reflected harm to [non-]parties." ATRA Br. at 16 & n.13 (emphasis in the original).

interest in punishment and deterrence, rather than the plaintiff's interest in compensation. As Justice Baldwin, sitting on circuit, explained, "vindictive or exemplary damages may be given to *indemnify the public* for past injuries and damages, and to *protect the community* from future risks and wrongs." *Bishop v. Stockton*, 3 F. Cas. 453, 454 (Baldwin, Cir. J., C.C. Pa. 1843)(emphasis added), *aff'd*, 45 U.S. 155 (1846).[28] Plainly, the entire course of misconduct was always part of the calculus.

Philip Morris seeks to resuscitate the debate between Theodore Sedgwick, the leading scholar of the day on damages, and Simon Greenleaf, an evidence scholar, that was over by 1868. The Appendix shows, however, that nearly every state that allowed punitive damages looked favorably upon Sedgwick's formulation that exemplary damages "blend[] together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender." 1 Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES 53 (7th ed. 1880). Although Greenleaf argued that punitive damages were simply added compensation,[29]

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[28] *See also Conrad v. The Pacific Ins. Co.*, 31 U.S. 262, 272-73 (1832)(in awarding exemplary damages, "the jury may not only take into view what is due to the party complaining, but to the public"); *Seymour v. McCormick*, 57 U.S. 480, 489 (1853)("exemplary damages" do not "recompense the plaintiff, but . . . punish the defendant."); *Stimpson v. The Railroads*, 23 F. Cas. 103, 104 (Grier, Cir. J. 1847); *Parker v. Corbin*, 18 F.Cas. 1122, 1122 (McLean, Cir. J. C.C.D. Ohio 1848).

[29] Philip Morris and each of its *amici* rely on Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 615 (2003), who, in turn relies primarily on secondary sources (including AM.JUR. and A.L.R.) in arguing that punitive damages were nothing but "additional compensation" for intangible injuries. Other scholars see "serious difficulties" in Colby's theory, finding it most likely "distorted and wrong," Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 142, 143 (2005), and finding it unsupported by the relevant 19th century cases. *See* Anthony J. Sebok, *What Did Punitive Damages Do? Why*

contemporary courts and the court of history overwhelmingly accepted Sedgwick's views.[30]

This Court and the courts of 27 of the 37 states in the Union before ratification agreed that exemplary damages *punished* past misconduct as a way of *deterring* future misconduct, *i.e.*, "to indemnify the public for past injuries and damages, and to protect the community from future risks and wrongs." *Bishop*, 3 F. Cas. at 454. *See* note 4 *supra*.[31]

Misunderstanding the History of Punitive Damages Matters Today, 78 CHI-KENT L. REV. 163, 181-204 (2003). Indeed, many courts held that punitive damages went "beyond a mere compensation for the actual loss or injury," *Dibble v. Morris*, 26 Conn. 416, 1857 WL 969, at *9 (1857). *See also Day*, 54 U.S. at 371; *Conrad*, 31 U.S. at 272-73; *Hendrickson v. Kingsbury*, 21 Iowa 379, 1866 WL 321, at *3 (1866); *Donnelly v. Harris*, 41 Ill. 126, 1866 WL 4550, at *2 (1866); *Hootman v. Shriner*, 15 Ohio St. 43, 46-47 (1864); *Nye v. Merriam*, 35 Vt. 438, 1862 WL 2609, at *2 (1862); *Pike v. Dilling*, 48 Me. 539, 1861 WL 1691, at *3 (1861).

[30] Indeed, "[s]ince the time of the controversy between . . . Greenleaf and Sedgwick . . . , a large majority of the appellate courts in this country have followed . . . Sedgwick." *Hendrickson*, 1866 WL 321, at *3. *Accord Peshine v. Shepperson*, 58 Va. (17 Gratt.) 472, 1867 WL 2892, at *10 (1867); *Gaither v. Blowers*, 11 Md. 536, 1857 WL 3817, at *9 (1857). These courts rejected Greenleaf precisely because his "extreme views . . . are not justified by the authorities, and are well refuted by Sedgwick," *Frink & Co. v. Coe*, 4 Greene 555, 1854 WL 228, at *3 (1854); they preferred Sedgwick's teachings because his "'conclusions . . . are well warranted by the decisions.'" *Towle v. Blake*, 48 N.H. 92, 1868 WL 2266, at *6 (1868)(quoting "Vol. 1, of Chancellor Kent's Com. 618"). This also represented the consensus view even 50 years later. 11 J.G. Sutherland, A TREATISE ON THE LAW OF DAMAGES, § 393, at 1284 n.62 (4th ed. 1916).

[31] *See also N.O., J. & G.N.Ry. Co. v. Hurst*, 7 George 660, 1859 WL 5326, at *6 (Miss. Er. App. 1859). Pre-ratification courts identified the relevant State interest concerns as ensuring public safety, *see Bishop*, 3 F. Cas. at 454-55; *Pickett v. Crook*, 20 Wis. 358, 1866 WL 2763, at *1 (1866); *Chi. & Rock Is. R.R. Co. v. McKean*, 40 Ill. 218, 1866 WL 4459, at *15 (1866); *Polk, Wilson & Co. v. Fancher*, 38 Tenn. 336, 1858 WL 2918, at *1, *2-*3 (1858); *Manderson v. Comm. Bank*, 28 Pa. 379, 1857 WL 7384, at *4 (1857); and preserving peace and forestalling violent self-help remedies. *See N.O., J. & G.N. Ry. Co. v. Bailey*, 40 Miss. 395, 1866 WL 1889, at *6 (1866); *Hawk v.*

The size of a punitive damages award was given in light of the "enormity of the offense," *Day*, 54 U.S. at 371, and "proportioned to the degree of negligence or wantonness shown," *Pickett v. Crook*, 20 Wis. 358, 1866 WL 2763, at *1 (Wis. 1866); *see also Dibble*, 1857 WL 969, at *9 (Conn. 1857); or "to the character . . . and the circumstances of aggravation." *Peshine*, 1867 WL 2892, at *8.[32]

Tellingly, ATRA completely misconstrues two of the fives cases it cites for its most crucial claim. Read correctly, these cases, and four others that also involve solitary plaintiffs who were injured by mass transportation companies, undercut rather than support Philip Morris's revisionism.

For example, ATRA asserts that *Hopkins v. Atlantic & St. Lawrence R.R.*, 36 N.H. 9, 1857 WL 2820 (N.H. 1857), illustrates the proposition that courts never "consider[ed]" harm to anyone but the plaintiff in the "calculation of exemplary award[s]." ATRA Br. at 19 n.15. In reality, the New Hampshire Supreme Court, affirming punitive damages awarded to the husband of a single passenger injured in a railroad accident, emphasized the broader public interest at stake in justifying punitive damages cases, explaining that:

> [i]f a serious personal injury happens to a [single] passenger, by gross negligence in the management of a railroad train, it is difficult to suggest a case where the public interest would more loudly call for an exemplary verdict. *It is a subject in which all the traveling public are deeply interested.*

Ridgway, 33 Ill. 473, 1864 WL 2956, at *1 (1864); *Champion v. Vincent*, 20 Tex. 811, 1858 WL 5406, at *5 (1858).

[32] *See id.* at 10. *See also Stimpson*, 23 F.Cas. at 104; *City of Chicago v. Martin*, 49 Ill. 241, 1868 WL 5212, at *1 (1868); *Phelin v. Kenderdine*, 20 Pa. 354, 1853 WL 6203, at *6-*7 (1853).

1857 WL 2820, at *7-8 (emphasis added).

ATRA also cites *Frink & Co. v. Coe*, 4 Greene 555, 1854 WL 228 (Iowa 1854). ATRA Br. at 19, n.15. That case involved an action for injury sustained by a single passenger when a stagecoach overturned. The Iowa Supreme Court held that because "stage proprietors are bound to use the greatest care for the safety of passengers" as a group, individual passengers injured through a defendant's gross neglect may seek punitive damages in excess of the individual's injuries. 1854 WL 228, at *3. [33] These cases consider the scope of the defendant's misconduct and its impact on the broader public, just as the Oregon Supreme Court did in this case.

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[33] Four other cases involving common carriers illustrate that pre-ratification courts were sensitive to the hazards posed to the public by fraudulent or reckless companies and were keen to uphold punitive damages awards that exceeded a plaintiff's actual injuries in order to punish the full breadth of the misconduct. *See Smyrna, Leipsic & Phila. Steamboat Co. v. Whilldin*, 4 Del. (4 Harr.) 228, 1845 WL 479 (Del. Super. Ct. 1845)(in steamboat collision case, the Chief Justice instructed the jury that punitive damages may be awarded because "a reckless disregard of human life deserv[ed] the severest punishment," *especially in light of "the defendant's knowledge of the number of passengers" on board* the plaintiff's ship. 1845 WL 479, at *5 (emphasis added); *Bishop*, 3 F.Cas. at 454 (in a case involving an overturned stagecoach, Justice Baldwin charged the jury that "[c]ontracts for carrying passengers are made not only with the party to the transaction, but they are also made with the public," and thus punitive damages are appropriate if an individual's "private loss or injury . . . ha[d] been occasioned by such negligence, unskilfulness or recklessness as concerns the safety of the traveling public" as a whole. *Id.* at 455); *Chi. & Rock Island*, 1866 WL 4459, at *15 (punitive damages available against a railroad for one passenger's injuries in order to further "the protection of the public."); *Brickell v. Frisby*, 2 Rob. 204, 1842 WL 1659, at *2 (La. 1842)(reversing a defense judgment because "[i]t is time that those who are interested in th[e] [transportation] business should be taught by exemplary damages . . . that they cannot sport with impunity with the lives of those who . . . trust to their skill and prudence; and that if they employ intemperate and reckless men in the management of their boats, they must take the consequences.").

History does not support Philip Morris's claims; in fact, it demolishes them.

B. Modern Cases Do Not Proclaim a Due Process Bar to Punishing a Defendant for its Harm to a State's Populace

Philip Morris bases much of its argument on this Court's statement in *State Farm* that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." Pet. Br. at 10, quoting *State Farm*, 538 U.S. at 423. In doing so, defendant misunderstands both what the Oregon Supreme Court did in this case and assigns the quoted passage with a weight it cannot bear.

The Oregon Supreme Court did not use harm to others to adjudicate the merits of any case other than the claims of this plaintiff. It did not multiply compensatory damages by the number of presumptive victims, even as *BMW* suggested could be done. It read *State Farm* to prohibit consideration of non-parties in analyzing the ratio. Pet. App. 30a-31a. Instead, the court considered the undisputed impact of Philip Morris's uniform fraud directed at the entire Oregon public[34] and maliciously injuring a significant number of its customers, including Williams, in its reprehensibility analysis, *id.* at 31a, as *State Farm* authorized. 538 U.S. at 427. After doing so, it concluded that Philip Morris's misconduct was "extreme and outrageous." Pet. App. 33a. Particularly because of the nature of this fraud, an expansive view of the public harm produced is appropriate.

Such a view is consistent with the broader public purpose served by punitive damages, which enables them to take into account harm to others. The Ohio Supreme Court, for example, stated the underlying principle as recognizing

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[34] Philip Morris did not contest the Court of Appeals summary of the record. Pet. App. 8a, n.1.

that while the "plaintiff remains a party, but the de facto party is our society." *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 104, 781 N.E.2d 121, 145 (Ohio 2002) (upholding a $30-million punitive award against a health insurer for cutting off medical payments to a woman who died of cancer). That award was upheld upon consideration of the "industry's central role in the lives of so many Ohioans," even though the misconduct before the court affected no one else. *Id.* at 103, 781 N.E.2d at 144.

By recognizing the plenary authority of States to set the scope and reach of punitive damages, *see* Section II, *supra*, at 20, this Court has endorsed the public-purpose approach under which a constitutionally valid award is one "supported by the State's interest in protecting its own consumers and its own economy." *BMW*, 517 U.S. at 572. Thus, for example, the *BMW* Court acknowledged that the "error-free portion" of the jury's verdict in that case, properly could have multiplied the lost value in the refinished cars ($4,000) by the number of affected consumers. *Id.* at 567 n.11. The error was in using a nationwide number of 1,000 as the multiplier, rather than the 14 refinished cars sold in Alabama, which would have produced an "award of $56,000." *Id.* This Court did not require that the validity of the other claims be adjudicated or that others be joined in that lawsuit.

Thus, not by implication, but by authoritative application, this Court authorized consideration of the impact of the misconduct on non-parties in calculating the appropriate punitive damage award. As one commentator observed, the "Court appeared to recognize that Alabama's interest was not tied only to Dr. Gore as the named plaintiff. Instead, Alabama was said to have punishment and deterrent-based interests related to other BMW customers in Alabama as well as in the state's economy more generally." Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 17 (2004).

State Farm marked no retreat from *BMW's* approval of this approach. In *State Farm*, this Court chastised the plaintiffs for failing to show any "conduct by State Farm similar to that which harmed them." 538 U.S. at 424. At another point in the opinion, this Court said there was "scant evidence" of similar misconduct. *Id.* at 423. If there had been any such evidence, the decision implied, it would have been appropriate to consider it in setting the punitive damages. That is, in fact, how the Utah Supreme Court read this Court's mandate. On remand, the Utah court said the decision permitted a harsher punishment based on "our concern that State Farm's defiance strongly suggests that it will not hesitate to treat its Utah insureds with the callousness that marked its treatment of the Campbells." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2005 UT 34, 35, 98 P.3d 409, 417-18, *cert. denied*, 543 U.S. 874 (2004). In setting punitive damages for this much more modest injury and record of reprehensibility at $9 million, Utah considered potential future harm to others in Utah. *Id.*, 98 P.3d at 416.

Professor Sharkey gives the passage Philip Morris quotes a somewhat different reading. She writes, a "more contextualized and nuanced reading of the opinion . . . suggests that the Court was primarily concerned with limiting the extraterritorial or out-of-state reach of punitive damages." Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 350 (2003). Why else, she asks, would this Court have discussed "'harm to the people of Utah,' at least in cases where such an 'adverse effect on the State's general population' could be shown?" *Id.*, quoting *State Farm*, 538 U.S. at 427. She correctly concludes that, under *State Farm*, "assessment of [punitive] damages to compensate for widespread harm may be appropriate--or at least constitutional--so long as it occurs within the confines of a single state." Sharkey, 113 YALE L.J. at 350; *see id.* at 362.

C. The Issue of Multiple Punitive Damage Awards is Not Present in this Matter

Philip Morris complains that Oregon law "creates the possibility of multiple punitive damage awards for the same conduct," and even "affirmatively promotes" duplicative awards, Pet. Br. at 10 & 11. Their complaint, however, is little more than a hypothetical possibility. Defendants have raised the specter of potentially unfair duplicative awards ever since Judge Friendly mentioned the possibility in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967). In reality, such awards appear to be rare. Neither Philip Morris nor its supporting *amici* cite a single example.

The jury's 1999 verdict in this case stands as the sole Oregon punishment levied against Philip Morris. The only other case in the Oregon courts where a jury awarded punitive damages against them was in a case involving a separate fraud in its marketing of "light" cigarettes, conduct completely different than that in this case. That award was vacated on the basis of instructional error. *Estate of Schwarz v. Philip Morris, Inc.*, 206 Or. App. 20, 135 P.3d 409 (2006).

Professor Cordray has suggested that the multiple punitive damage issue poses a "potential for either overdeterrence or underdeterrence." Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 279 (1999). Oregon has responded to this problem with dual statutory protections. Both juries (OR. REV. STAT. §§ 30.925(2)(g)) and reviewing courts (§ 31.730(2)) are separately required to take into account the "total deterrent effect" of other punishments imposed for the same misconduct. The Court of Appeals found this protection ensures that "any future award [will be adjusted] to account for this one." J.A. 66a-67a.

In addition, OR. REV. STAT. § 31.730(3) provides that "the court *shall* consider the amount of any previous judgment for punitive damages entered against the same defendant

for the same conduct." (emphasis added). These protections are available to Philip Morris when the time is ripe.

V. Denial of Philip Morris's "Proportionality" Jury Instruction Did Not Violate Due Process

Philip Morris claims that the trial court's failure to give its proffered "proportionality" jury instruction violated Due Process. That claim is procedurally and substantively untenable. Not only did Defendant's proposed instruction fail to meet minimum state requirements for accuracy and clarity, but Philip Morris told the trial court that the jury need not be instructed on proportionality and that the issue could instead be fully considered during post-verdict review. Philip Morris may not now claim that the refusal to give its instruction requires reversal. Defendant's proposed instruction was self-contradictory and wrong on the law, but if rejection of the substance of the instruction was error at all, the error was both invited and harmless.[35]

A. The Trial Court Was Not Required to Give Erroneous and Self-Contradicting Instruction

Philip Morris is wrong about whether harm to non-parties can be considered in measuring punitive damages. *See* Section IV, *infra*, at 35. Even if it were correct, no precedent requires or even suggests that a jury must be instructed in the fashion that Philip Morris now insists is necessary. In fact, although proportionality was discussed in both *BMW* and *State Farm*, the only mention of any mandatory jury instruction is found in *State Farm*, which

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35 "Most constitutional errors" are a form of "trial error" subject to harmless-error analysis. *See United States v. Gonzales-Lopez*, 126 S.Ct. 2557, 2563-64 (2006) (relying upon *Arizona v. Fulminante*, 499 U.S. 279 (1991)). Where there is "careful appellate weighing," even in the context of a criminal death-penalty case where concerns for unconstitutional deprivations should be heightened, "an appellate court's proportionality review" is generally sufficient to meet constitutional objections. *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990).

held that a jury must be advised that "it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422.

There is no merit to Philip Morris's new argument that an instruction on "proportionality" can somehow be extrapolated from *State Farm's* mandate to instruct against considering lawful *extraterritorial* conduct.[36] Pet. Br. at 23. In fact, *State Farm* said that application of the *BMW* guidelines, which include the proportionality principle, is a task for the trial court and that the *de novo* review conducted by an appellate court is "of a trial court's application of them to the jury's award." *State Farm*, 538 U.S. at 418.

A "request for an instruction may properly be denied, without error, unless the requested instruction is clear and correct in all respects, both in form and in substance, and unless it is altogether free from error." *Beglau v. Albertus*, 536 P.2d 1251, 1256 (Or. 1975) (citations omitted). Philip Morris's proposed instruction, which covered three-and-a-half pages and is quoted in part here, conflicted with the governing state law:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. *Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is*, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which

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[36] One cannot infer from the fact that proportionality is one of three punitive damages *BMW* guideposts that the jury should be instructed on it. While juries are told told that the reprehensibility of a defendant's misconduct is central to the punitive damage calculus, the third factor, comparability, cannot practically be the subject of a jury instruction.

> other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

J.A. 280a (emphasis added; pagination omitted).

The proposed instruction also would have told jurors that they "may . . . consider the defendant's financial condition as part of the process of arriving at an appropriate punishment," J.A. 281a, but "must not allow [their] decision to be influenced by the defendant's financial condition," J.A. 280a.[37]

Plainly, the instruction would have told the jury not to punish Philip Morris for the impact of its misconduct on other persons while also instructing the jury *to consider* that impact in determining the reasonable relationship between the punishment and the harm to Williams. It would also have told the jury both to consider *and* not to consider Philip Morris's financial condition. Defendant's proposed instruction thus resembled the directions Dorothy received from the scarecrow in the *Wizard of Oz*, when he pointed in two opposite directions simultaneously.[38]

Harm to others, of course, is a plainly permissible consideration in the reprehensibility calculation, as *BMW*, 517 U.S. at 576-77, and *State Farm*, 538 U.S. at 426-27, both held. Although Philip Morris *now* argues reprehensibility is the only place harm to others may be considered, Pet. Br. at 22, the instruction it offered at trial told the jury to consider harm to others "in determining . . . [the] reasonable relationship;" that is, *in determining proportionality*.

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[37] Philip Morris's argument that it was entitled to a proportionality instruction does not discuss the internal contradictions in its proposed instruction. *See* Pet. Br. at 23-25.

[38] Noel Langley *et al.*, The Wizard of Oz (movie script), *available at http://www.un-official.com/The_Daily_Script/ms_wizoz.htm.*

Every Oregon jurist reviewing Philip Morris's lengthy, confusing, and self-contradictory instruction – the trial court, the unanimous panel for the Court of Appeals, and the unanimous Oregon Supreme Court – found it did not make sense. J.A. 195a; Pet. App. at 18a n.3 & 67a n.15. Philip Morris even concedes that the concept it attempted to convey may be "elusive." Pet. Br. at 23. Certainly, nothing in Defendant's proposed instruction made it any clearer.

B. Due Process Does Not Require A Proportionality Instruction

Philip Morris told the trial court that proportionality "is generally addressed post-judgment – post-verdict, at least, in determining whether the amount of punitive damages is constitutionally excessive." J.A. 191a. When the court asked whether there was any precedent that requires a court to "tell the jury about proportionality," Philip Morris's counsel unequivocally answered, "It has always been addressed post-verdict."[39] *Id.* at 193a.

The court accepted that representation as the usual practice and chose not to vary from it. Considerations of comity suggest that the trial court's refusal to give the instruction is not error. Reflecting the respect due state tribunals, this Court has held that a "federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003). In *Mitchell*, this Court recognized that the state court's decision did not conflict with the reasoning or holdings of prior

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[39] The defense's representation is consistent with the observation of this Court in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437, 440, 436 (2001), where it held that "[t]rial courts and appellate courts seem equally capable of analyzing the second *[Gore,* disparity] factor," and that appellate review of the award's size and constitutionality is *de novo*.

precedent and thus was not "contrary to . . . clearly established Federal law." *Id.*

The Oregon Supreme Court could have justifiably looked no further than this Court's ruling in an earlier case that arose in Oregon. In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), this Court confirmed that post-verdict review of punitive damage awards, rather than jury instructions, provides the most constitutionally significant constraint on a jury's discretion. The Court specifically rejected the argument that detailed jury instructions required by Oregon law adequately constrained the jury's discretion. *Id.* at 433; *see also id.* at 440-43 (Ginsburg, J., dissenting).

Therefore, Oregon's denial of Philip Morris's "proportionality" instruction cannot be regarded as an unreasonable application of federal law that merits reversal. That it was induced by Philip Morris's own representations of the state of the law makes reversal particularly inapt.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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Appendix

FEDERAL APPELLATE CASES – *Bishop v. Stockton*, 3 F. Cas. 453, 454-55 (Baldwin, Circuit Justice, C.C. Pa. 1843) (No. 1440), *aff'd*, 45 U. S. (4 How.) 156 (1846) (In an action brought to recover damages for injuries sustained when a stagecoach overturned, the jury was instructed that "the case concerns the public as well as the parties." The court explained that in addition to compensatory damages, "vindictive or exemplary damages may be given to indemnify the public for past injuries and damages, and to protect the community from future risks and wrongs. . . . [T]o justify exemplary damages, the injury must be more than a mere private loss or injury, it must have been occasioned by such negligence, unskilfulness or recklessness as concerns the safety of the traveling public.").

Stimpson v. The Railroads, 23 F. Cas. 103, 104 (Grier, Circuit Justice, 1847) (No. 13,456) (In upholding an award of vindictive damages in a patent infringement case, the court held that "[i]t is a well settled doctrine of the common law, though somewhat disputed of late, that a jury in actions of trespass or tort may inflict exemplary or vindictive damages upon a defendant, having in view the enormity of defendant's conduct rather than compensation to the plaintiff. Indeed in many actions such as slander, libel, seduction, &c. there is no measure of damages by which they can be given as compensation for an injury, but are inflicted wholly with a view to punish, and make an example of the defendants.") (internal citation omitted).

Parker v. Corbin, 18 F. Cas. 1122 (McClean, Circuit Justice, C.C.D. Ohio 1848) (No. 10,731) (In an action for patent infringement, the court held "where the circumstances were of a somewhat aggravated character, what was sometimes called in the law vindictive damages might be given, which would include counsel fees, and something more by way of example to deter others from doing the same thing.").

Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (Grier, J.) (In a trespass action, the court held that it was proper for the trial court to charge the jury regarding the

propriety of punitive damages. "It is a well-established principle of the common law, that in actions of trespass and all actions . . . for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. . . . In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit.").

Seymour v. McCormick, 57 U.S. (16 How.) 480, 489 (1853) ("[W]here the injury is wanton or malicious, a jury may inflict vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant.").

ALABAMA - *Mitchell v. Billingsley*, 17 Ala. 391, 1850 WL 249, at *2 (Ala. 1850) ("It is well settled that . . . in actions of this kind," where the defendant willfully removed fruit trees from plaintiff's property and threatened him with a gun, "the jury are not confined to the actual damage. The law in cases attended with circumstances of aggravation, allows the jury to give exemplary damages.") (citation omitted).

Rhodes v. Roberts, 1 Stew. 145, 1827 WL 506, at *1 (Ala. 1827) (Exemplary damages may be recovered in an action for personal injuries, when the defendant's negligence, in shooting plaintiff, is "very gross and reprehensible").

Sharpe v. Hunter, 16 Ala. 765, 1849 WL 532, at *2 (Ala. 1849) (If a defendant wrongfully prosecutes a suit for a writ of attachment with "malice or intention to vex the defendant" "then vindictive damages may be recovered. . . .") (citations omitted).

Donnell v. Jones, 13 Ala. 490, 1848 WL 426, at *8 (Ala. 1848) (Vindictive damages, exceeding damages for plaintiff's actual injuries, may be sought for malicious prosecution of a writ of attachment); *see also Devaughn v. Heath*, 37 Ala. 595, 1861 WL 443, at *1 (Ala. 1861) (vindictive damages are available for wanton or reckless trespasses on land).

CALIFORNIA - *Dreux v. Domec*, 18 Cal. 83, 86 (Cal. 1861) (affirming punitive damages award of $2,250 for malicious prosecution, and rejecting defendant/appellant's contention that the trial court erred by instructing the jury that if they "believe the defendants prosecuted plaintiff maliciously and without probable cause, they are at liberty in assessing the damages to go beyond the actual injury sustained, and give exemplary damages").

Wilson v. Middleton, 2 Cal. 54, 54 (Cal. 1852) (Vindictive damages may be given in a civil action for a personal injury, even if the act is punishable by a criminal prosecution).

CONNECTICUT - *Bartram v. Stone*, 31 Conn. 159, 1862 WL 680, at *3 (Conn. 1862) ("[F]or a premeditated malicious battery larger damages ought to be awarded than for a personal injury resulting rather from accident than design, or produced by unjustifiable and immediate provocation from the injured party. Our courts have never adopted the rigid rule contended for by the [defendant's] counsel, that no more than the actual damage done to the plaintiff by a battery or any other trespass should ever be recovered by

him. Exemplary damages have been allowed in proper cases from the first institution of courts among us.")

Dibble v. Morris, 26 Conn. 416, 1857 WL 969, at *9 (Conn. 1857) ("By a series of decisions in this state, it is settled that in actions sounding in tort, where the injury was inflicted wantonly or maliciously, the jury are at liberty to give, and it is proper for them to give, damages beyond a mere compensation for the actual loss or injury, and exemplary or vindictive in proportion to the degree of malice or wantonness evinced by the defendant.") (citations omitted).

Linsley v. Bushnell, 15 Conn. 225, 1842 WL 510, at *9 (Conn. 1842) ("There is no principle better established, and no practice more universal, than that vindictive damages, or smart money, may be, and is, awarded, by the verdicts of juries, in cases of wanton or malicious injuries, and whether the form of the action be trespass or case.").

Churchill v. Watson, 5 Day 140, 1811 WL 1056, at *3 (Conn. 1811) (ordering a new trial where court erred by allowing only compensatory damages and rejecting evidence in support of punitive damages, and holding "In addition to the actual damage which the party sustains, in actions founded in tort, the jury are at liberty to give a further sum, which is sometimes called *vindictive*, sometimes, *exemplary*, and at other times, *presumptive* damages. These, from their nature, cannot be governed by any precise rule; but are assessed by the jury, upon a view of all the circumstances attending the transaction. It ought, therefore, to have been admitted in evidence, and the jury ought to have taken into consideration, in assessing the damages, that the taking by the defendant, was malicious, and with intent to obstruct the plaintiff, and to prevent the building of his vessel; and all the circumstances attending the transaction, ought to have been heard and considered. If the defendant, in a quarrelsome manner, had interfered with the building of the vessel, and by threats, had attempted to induce the plaintiff to desist, and failing in this, and knowing that no other spar could be obtained, and with a

view to prevent the building of the vessel, had taken it away forcibly, or wantonly destroyed it, a jury might give a larger sum in damages, than they would do, had it been taken under a mistaken apprehension of the rights of the parties.") (emphasis in original).

DELAWARE - *Smyrna, Leipsic & Phila. Steamboat Co. v. Whilldin*, 4 Del. (4 Harr.) 228, 1845 WL 479, at *5 (Del. Super. Ct. 1845) (In a trespass action, one steamboat passenger alleged that the captain of another steamboat intentionally steered the second boat into the first, causing it to sink. The court held that "[d]amages are in the discretion of the jury. If the jury think that this boat was run into by captain Whilldin, willfully and designedly, they would be justified in awarding vindictive damages to any amount which, in the exercise of a sound judgment and discretion, they deem proper, by way of public example. Considering the time; the occasion; the defendant's knowledge of the number of passengers; a wilful sinking of the *Kent* would evince a reckless disregard of human life deserving the severest punishment.").

Jefferson v. Adams, 4 Del. (4 Harr.) 321, 1845 WL 511, at *2 (Del. Super. Ct. 1845) ("[I]n actions of trespass for wilful injuries the jury might . . . give damages by way of punishment, and beyond a mere compensation of the actual injury. It was for the jury to say whether there were circumstances of aggravation in this case, which ought in their judgment, to require a departure from the general rule of compensatory damages; and which called on them to add any thing by way of public example or punishment.").

Kinney v. Hosea, 3 Del. (3 Harr.) 397, 1842 WL 523, at *4 (Del. Super. Ct. 1842) (In a tort suit "if [the defendant] was actuated by actual or express malice, this would aggravate the case, and make him liable to exemplary damages in the discretion of the jury, by way of punishment for such an outrage, and as an example to deter others.").

Parke v. Blackiston, 3 Del. (3 Harr.) 373, 1841 WL 405, at *3 (Del. Super. Ct. 1841) ("Compensatory damages are for wounded feelings, time lost, and money expended in the suit. Exemplary damages, to warn the [wrongdoer] that he is violating the laws of the land; to close his mouth; to protect society, and secure it from the use of the pistol and bowie knife, by an assurance that the law will avenge all wrongs, and that private vengeance is unnecessary. Society is always wounded when any of its members are injured; and in a glaring case like this it needs to be avenged by a verdict which shall punish the daring violator of its peace.").

GEORGIA – *Kendrick v. McCrary*, 11 Ga. 603, 1852 WL 1363, at *4 (Ga. 1852) (In affirming a father's award of $1,000 in vindictive damages – in comparison to only $49 in actual damages – for the seduction of his daughter, a unanimous state supreme court explained, "It has been truly said, that more instructive lessons are taught in Courts of Justice, than the Church is able to inculcate. Morals come in the cold abstract from the pulpit; but men smart under them practically, when Juries are the preachers.").

ILLINOIS – *Foote v. Nichols*, 28 Ill. 486, 1862 WL 3347, at *2 (Ill. 1862) (In a trespass action for assault and battery, the trial court correctly instructed the jury that if the evidence established that "the defendant assaulted the plaintiff without provocation, and that such assault was an aggravated one, and that the public good, or justice to the plaintiff, or both, demand it, then the law is that they are not confined in their verdict to actual damages proven, but may give exemplary damages not only to compensate the plaintiff, but to punish the defendant for such wanton injury. . . . In such a case, the jury may go beyond mere compensation to the plaintiff, and admonish the defendant and all others in the same way inclined, that the peace of society is not to be thus violated with impunity."). *See Ously v. Hardin*, 23 Ill. 403, 1860 WL 6267, at *1 (Ill. 1860) ("[I]t is a well settled common law principle, that in actions for torts to the person, and in malicious torts to property, the jury may

give smart money in the shape of heavy damages, not as compensation alone for the injury received, but as punishment to the defendant who did the wrong; hence they are sometimes called punitory or punitive damages."); *Smith v. People*, 25 Ill. 17, 1860 WL 6489, at *3 (Ill. 1860) ("The law does not punish criminally every unlawful act, although it may be a grievous offense to society." Instead, there are "numerous instances" in which offenses "which are not by law punishable as crimes, but which are unlawful as violative of the rights of individuals and for which the civil law will afford a remedy to the injured party, and will at the same time and by the same process punish the offender for the wrong and outrage done to society, by giving exemplary damages, beyond the damages actually proved.").

Chi. & Rock Island R.R. Co. v. McKean, 40 Ill. 218, 1866 WL 4459, at *15 (Ill. 1866) (In an action for personal injuries, punitive damages may be awarded because "the case of a railroad train running regardless of law, demands, at the hands of a jury, something more in the way of damages, than a mere individual, and this for the protection of the public.").

See Donnelly v. Harris, 41 Ill. 126, 1866 WL 4550, at *2 (Ill. 1866) (Vindictive damages are available to "inflict[] damages beyond the injury actually received by the plaintiff . . . [if] the evidence shows deliberate malice, a vindictive spirit, or a reckless disregard for the personal security of another, and the person committing the wrong does so to gratify his malice, the law has always authorized a jury to give smart-money, as a kind of punishment for the aggravated wrong.").

Sherman v. Dutch, 16 Ill. 283, 1855 WL 5413, at *3 (Ill. 1855) (In a trespass action for the theft, conversion, and destruction of property, "the plaintiff may recover, not only for the pecuniary loss sustained, as the natural and legal consequence of the trespass, but he may recover vindictive or exemplary damages, in consideration of the circumstances attending the wrongful act, the malice,

willfulness, wantonness or corrupt motive attending the act. . . . It was proper that the jury should be informed of the character of the property taken, the use to which it was appropriated and adapted, the consequences that would follow from its removal, the manner of its removal, and the circumstances generally attending the act, for the purpose of determining upon its value, and also upon the motives governing the defendants. If that motive was to gratify revenge, to break up a newspaper obnoxious to them, or to oppress the plaintiff under the color of law, exemplary damages would be proper, such as would serve as an example to others.").

INDIANA –*Miles v. Wingate*, 6 Ind. 458, 1855 WL 3604, at *1 (Ind. 1855) (Where a plaintiff in an action for the continuance of a nuisance had previously obtained a judgment against the defendant for the same nuisance, plaintiff was entitled to exemplary damages as "[e]very continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie; and very exemplary damages will probably be given, if after one verdict against the defendant he has the hardiness to continue it.") (citations omitted).

Anthony v. Gilbert, 4 Blackf. 348, 1837 WL 1897, at *1 (Ind. 1837) (In a trespass action for taking and carrying away personal property, not only is "[t]he assessment of damages . . . a matter which must be, unavoidably, in a great measure left to the discretion of the jury," but "[i]t is proper for them to take into consideration all the circumstances under which a trespass may have been committed; and wherever malice, insult, or deliberate oppression, has been an ingredient in the wrongful act, to award, in addition to the actual loss sustained, such exemplary damages as shall tend to prevent a repetition of the injury.").

IOWA – Hendrickson v. Kingsbury, 21 Iowa 379, 1866 WL 321 at *7 (Iowa 1866) (In a successful action for compensatory and exemplary damages against a defendant, the court stated that "the damages allowed in a civil case by

way of punishment, have no necessary relation to the penalty incurred for the wrong done to the public: but are called punitive damages by way of distinction from pecuniary damages, and to characterize them as a punishment for the wrong done to the individual. In this view, the awarding of punitive damages can in no just sense be said to be in conflict with the constitutional or common law inhibition against inflicting two punishments for the same offense."). *See also Garland v. Wholeham*, 26 Iowa 185, 1868 WL 310 (Iowa 1868) (affirming a punitive damages award, "in addition to the actual value of the property destroyed," as punishment for the defendant's malicious killing of the plaintiff's horses).

Frink & Co. v. Coe, 4 Greene 555, 1854 WL 228, at *3 (Iowa 1854) (In an action for injury sustained by a passenger when a stage coach overturned, the jury awarded compensatory and punitive damages. In affirming that award, the court upheld the jury instruction, which advised that because stage coach proprietors "carry passengers for hire and compensation, [they] are responsible for all accidents and injuries happening to the persons of the passengers." Indeed, the court explained, because "stage proprietors are bound to use the greatest care for the safety of passengers," individual passengers who are injured through a defendant's gross neglect are entitled to punitive damages, damages in excess of the plaintiff's injuries. In so holding, the court expressly rejected Greenleaf's views and ratified Sedgwick's.). *See also Williamson v. W. Stage Co.*, 24 Iowa 171, 1867 WL 293, at *1 (Iowa 1867) (exemplary damages may be given in cases of fraud, malice, gross negligence, or oppression).

KENTUCKY - *Parker v. Jenkins*, 66 Ky. (3 Bush) 587, 1868 WL 4007, at *3 (Ky. 1868) (In cases of "trespass or torts, accompanied by oppression, fraud, malice, or negligence so gross as to raise a presumption of malice, the jury have discretion to award exemplary or vindictive damages - in all other cases of civil injury or breach of contract, the object is

to give compensation to the party injured for the actual loss sustained.") (citation omitted).

Slater v. Sherman, 68 Ky. (5 Bush) 206, 1869 WL 6800, at *5 (Ky. 1868) ("Although there is some conflict of authority on the question, it may be regarded as settled in this State, and, as we think, in accordance with principle and the weight of authority, that a plaintiff may recover vindictive or punitive damages for personal injuries, where the commission of the act complained of is accompanied with circumstances of aggravation.").

Bd. of Internal Improvement of Shelby County v. Scearce, 63 Ky. (2 Duv.) 576, 1864 WL 2586, at *2 (Ky. Ct. App. 1864) (upholding statute stating that "if the life of any person or persons is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid.") (citation omitted).

LOUISIANA – *Brickell v. Frisby*, 2 Rob. 204, 1842 WL 1659, at *2 (La. 1842) (In an action by the owners of one steamboat to recover damages from the owners of a second, which caused the two boats to collide on the Mississippi River, due to gross negligence of the officers and crew of the latter boat, the court reversed the judgment and remanded, ordering that "[i]t is time that an example should be made. It is time that those who are interested in this [transportation] business should be taught by exemplary damages, if they cannot be reached in any other way, that they cannot sport with impunity with the lives of those who, from necessity, trust to their skill and prudence; and that if they employ intemperate and reckless men in the management of their boats, they must take the consequences.").

MAINE – *Pike v. Dilling*, 48 Me. 539, 1861 WL 1691, at *3 (Me. 1861) (In a trespass action for maiming and disfiguring

the plaintiff, the court upheld a punitive damages award and rejected the defendant's claim that the trial court erred by instructing the jury that "in such case, they were authorized, if they thought proper, in addition to the actual damages the plaintiff has sustained, to give him a further sum, as exemplary or vindictive damages, both, as a protection to the plaintiff, and as a salutary example to others, to deter them from offending in like cases." Quoting *Day v. Woodworth*, the court reasoned that "'It is a well established principle of the common law that, in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence, rather than the measure of compensation to the plaintiff.' This statement of the law was in perfect conformity with the previous decisions which had received the sanction of th[is] Court, . . . 'as well in the English as in the American courts of justice, that, in actions for injuries to the person, committed under the influence of actual malice, or with the intention to injure the plaintiff, the jury may, in their discretion, give such damages beyond the actual injury, for sake of the example, – damages not only to recompense the sufferer, but to punish the offender.' . . . Indeed, such is declared to be the law in nearly all the States of the Union, unless it be in those of Massachusetts and Indiana. Such, too, is the law of England") (citations omitted).

MARYLAND – *Gaither v. Blowers*, 11 Md. 536, 1857 WL 3817, at *9 (Md. 1857) (In a trespass action for assault and battery, the court affirmed a punitive damages award that both punished the defendant as well as compensated the plaintiff, explaining that "the jury [are not] confined to the mere corporal injury which the plaintiff has sustained; but they are at liberty to consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon to award such exemplary damages as the circumstances may, in their judgment require." "It may readily be supposed that the consequences of a severe

personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessaries of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured. In this class of cases, the jury may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant. The standard of damages is not a fixed one, applicable to all cases, but is to be regulated by the circumstances of each particular case.' This is good sense, and is sustained by the decisions in most of the States.") (citations omitted). *Accord Wilms v. White*, 26 Md. 380, 1867 WL 3179, at *5 (Md. 1867) (affirming judgment, stating "Exemplary damages are here recognized as a right of the plaintiffs. . . .").

MISSISSIPPI – *New Orleans, Jackson & Great N. Ry. Co. v. Bailey*, 40 Miss. 395, 1866 WL 1889, at *6 (Miss. 1866) (In a trespass against action for injuries suffered by a railroad passenger in a crash due to the negligence of railroad employees, a jury awarded, and the state's highest appellate court affirmed, an award of punitive damages against the railroad.").

Heirn v. McCaughan, 32 Miss. 17, 1856 WL 2645, at *16 (Miss. 1856) (In a tort action for fraud, gross negligence, or oppression against common carrier, a steamboat, for breach of general duty in failing to stop at a particular place and take on board the plaintiff as a passenger, according to previous notice advertised to the public, Mississippi's highest court affirmed an award of exemplary damages, explaining that in cases of "fraud, gross negligence or oppression . . . it is now too well settled to admit of controversy, that the jury may, in their discretion, award such damages by way of punishment, or for the sake of

example, as they may think that the peculiar circumstances of the wrong to the plaintiff justifies.") (citation omitted).

MISSOURI - *Goetz v. Ambs*, 27 Mo. 28, 1858 WL 5729, at *4 (Mo. 1858) (In a trespass action for assault and battery, the Missouri Supreme Court affirmed an award of exemplary damages, explaining, "if the act is willful or intentional, then 'the idea of compensation is abandoned, and that of punishment is introduced.' It is said generally that malice must exist to entitle the plaintiff to any thing more than reparation for the injury; but it will be found that the word malice is always used, in such connections, not in its common acceptation of ill-will against a person, but in its legal sense, 'willfulness - a wrongful act, done intentionally, without just cause.'") (citations omitted).

NEW HAMPSHIRE - *Towle v. Blake*, 48 N.H. 92, 1868 WL 2266, at *6 (N.H. 1868) (In a trespass action for personal injuries caused by an assault and battery, the court entered judgment on the verdict for exemplary damages, explaining that "in torts involving circumstances of aggravation, showing malice, insult, oppression, wanton or wilful violence, courts are at liberty to instruct a jury that they may find exemplary damages, such as plaintiff ought to have and the defendant ought to pay. . . . The great weight of authority, under the practice, as administered in England, and in most of the States in this country, seems to be in support of this doctrine."). *Perkins v. Towle*, 43 N.H. 220, 1861 WL 4352, *4-*5 (N.H. 1861) ("[T]he principle [i]s established, that in actions for torts to the person and personal property, the jury may give exemplary damages, &c.").

Hopkins v. The Atlantic & St. Lawrence R.R., 36 N.H. 9, 1857 WL 2820, *7-*8 (N.H. 1857) (In affirming a judgment on a plaintiff's verdict in a trespass action against a railroad by the husband to recover damages for an injury to the wife, caused by carelessness of the defendants in the management of their trains, the court held that not only may compensatory damages be recovered for loss of the wife's

services, and for expenses incurred by the husband in her cure, but that the jury may award exemplary damages where the railroad has caused a personal injury because of its gross carelessness in managing its trains. As the court explained: "If a corporation like this railroad is guilty of an act or default, such as, in the case of an individual, would subject him to exemplary damages, we think the same rule must be applied to the corporation." "It is objected that in this case exemplary damages cannot be recovered, because the foundation of the action is negligence, and not a willful and malicious act of the defendants. Such damages [however] are awarded for the sake of the public example, or to punish some act or default which has more or less the character of a crime. The right to recover them is not confined to one form of action. They may be recovered in case as well as trespass. . . . If a serious personal injury happens to a passenger, by gross negligence in the management of a railroad train, it is difficult to suggest a case where the public interest would more loudly call for an exemplary verdict. . . . Gross carelessness, where duty to the public requires the utmost care – and even that is not always sufficient to prevent the most serious calamities – has certainly a strong character of cruelty and moral turpitude. All the general reasons which have been assigned for allowing exemplary damages appear to apply in full force to this case, and we think the instructions of the court on that point were correct.").

Whipple v. Walpole, 10 N.H. 130, 1839 WL 1433 at *2 (N.H. 1839), (In an action to recover damages for the loss of the plaintiff's horses, arising from a defect in a bridge, which the defendants had been bound to repair, the court upheld an award of exemplary damages for the defendant's gross negligence, explaining that the "principle" has been "established that in actions for torts to the person and to personal property, the jury may give liberal, or exemplary damages, in their discretion – damages beyond the actual injury sustained, for the sake of the example," and quoting Chancellor Kent for the proposition that 'But it cannot be

required to multiply instances in which the doctrine contained in this part of the charge has received the sanction of the English and of the American courts of justice. It is too well settled in practice, and too valuable in principle, to be called in question.'") (citation omitted), *overruled in part on other grounds, Woodman v. Town of Nottingham*, 49 N.H. 387, 1870 WL 3060 (N.H. 1870).

NEW JERSEY – *Coryell v. Colbaugh*, 1 N.J.L. 77, 1791 WL 380, at *1 (N.J. 1791) (In an action on a promise of marriage and for seduction, which was fully proved, with strong circumstances of aggravation, the court affirmed an award of exemplary damages, explaining that the purpose of such damages in tort suits was "for example's sake, to prevent such offences in future . . . ."). *See Thompson v. Morris Canal & Banking Co.*, 17 N.J.L. 480, 1840 WL 2713, at *4 (N.J. 1840) ("[V]indictive damages, over and above mere recompense," are awarded "by way of punishment for wanton mischief or malicious and revengeful actions . . . to deter men from such kind of conduct.").

NEW YORK – *Bush v. Prosser*, 11 N.Y. 347, 359, 1854 WL 6009 (N.Y. 1854) (In an action seeking punitive damages for slander, the Court of Appeals of New York held that although civil actions are generally "designed to redress private and not public wrongs; and yet every one knows that the value of the administration of our civil jurisprudence consists not alone in the wrongs it redresses, but in those it prevents; and especially is this true of the class of actions we are considering. It will be found that, from the origin of the common law, all those actions which impute malice to the defendant have been used to some extent to protect the public interests, and to repress the indulgence of those vindictive feelings which tend to disturb the peace of society. In this view the damages should, to some extent, be measured by the degree of malice proved.").

Taylor, Hale & Murdoch v. Church, 8 N.Y. 452, 1853 WL 6035 (N.Y. 1853) ("The principle is well established as well in the English as in the American courts of justice, that in

actions for injuries to the person, committed under the influence of actual malice or with the intention to injure the plaintiff, the jury in their discretion may give damages beyond the actual injury sustained, for the sake of the example – damages not only to recompense the sufferer, but to punish the offender.") (citation omitted).

NORTH CAROLINA – *Causee v. Anders*, 20 N.C. (3 & 4 Dev. & Bat.) 388, 1839 WL 542, at *2 (N.C. 1839) (In a trespass action for assault and battery, the court upheld punitive damages based on the following instruction: "that if the jury found for the plaintiff, the amount of damage was a matter for their consideration; that usually and as a general rule in actions of this nature, the plaintiff had a right to expect a fair compensation in damages for the injury really sustained: as for the loss of time when by the act of the defendant he was rendered unable to attend to business, and the expense of calling in a physician, or the actual loss in being deprived of a tooth; but in addition to this the jury were sometimes called on to increase the amount of damages by adding on something by way of punishment, when it appeared that the defendant was actuated by malice and a total disregard of the laws, and the plaintiff was in no wise to blame.").

Smithwick v. Ward, 52 N.C. (7 Jones) 64, 1859 WL 2140, at *2 (N.C. 1859) ("vindicatory or punitory . . . damages [are] allowed to punish the defendants for violating the laws, and by making them *smart* to deter others as well as themselves from similar violations.") (emphasis in original).

OHIO – *Roberts v. Mason*, 10 Ohio St. 277, 279-80, 1859 WL 78 (Ohio 1859) (In affirming an award of punitive damages in a trespass action for assault and battery, the Supreme Court of Ohio acknowledged "[t]hat in cases of tort, where express malice is shown to have prompted the wrong complained of, the law, instead of adhering to the rule of compensation merely, permits a jury to go further, and, blending together the interest of society and of the individual aggrieved, to give damage not only to

recompense the sufferer, but to punish the offender . . . . [I]t seems to us, that if any thing can be settled by judicial decision and long and general practice, this doctrine must be regarded as thus settled.").

Ehrman v. Hoyt, 3 Ohio Dec. Reprint 308, 1858 WL 4543, at *2 (Ohio Super. Ct. 1858) (In a trespass action, the court held that "[a]s to the measure of damages, . . . [t]he first effort of a jury should be to make compensation for the actual damage sustained; but beyond this the law allows vindictive damages, or 'smart money,' as it is sometimes called, for the sake of preserving the peace of society from malicious wrong.").

Rollins v. Pennock, 2 Ohio Dec. Reprint 735, 1862 WL 2543, at *2 (Ohio Ct. Com. Pl. 1862) ("Damages beyond mere compensation are given as exemplary, vindictive or punitory damages – by way of example, and to prevent the repetition of similar wrongs in community. . . .").

Rayner v. Kinney, 14 Ohio St. 283, 1863 WL 13, at *1 (Ohio 1863) (In an action for slander, the state supreme court explained that "exemplary damages . . . are intended to punish the defendant, and to operate as an example to deter others from committing the like offense.").

PENNSYLVANIA – *Barnett v. Reed*, 51 Pa. 190, 1865 WL 4668, at *2, *5 (Pa. 1865) (In an action for the malicious abuse of legal process in issuing an execution on a judgment against the plaintiff, known by defendant to have been paid, and causing the sale of the plaintiff's goods, the court affirmed the jury's award of vindictive damages. The court held that the following charge to the jury was "unexceptionable": "Compensatory damages are such as indemnify the plaintiff, including actual loss or injury of property, loss of time and necessary expenses, counsel fees and any other actual loss the plaintiff suffered," but "where actual malice exists, a formed design to injure and oppress, the jury may give vindictive damages; that is, damages to punish the defendant for his fraud and malice.") *See Nagle v.*

Mullison, 34 Pa. 48, 1859 WL 8761, at *5 (Pa. 1859) ("[T]he law is well settled that . . . [i]n every case of oppression, outrage, and vindictiveness on part of the trespasser, the damages may be estimated and given in a punitive shape, rather than merely as compensatory."); *McDonald v. Scaife*, 11 Pa. 381, 1849 WL 5714, at *5 (Pa. 1849) ("Where there is more than ordinary wrong, either in the taking or detention, justice seems to require something in addition as a compensation to the injured party, and a punishment to the wrong-doer."); *Robison v. Rupert*, 23 Pa. 523, 1854 WL 6397, at *2 (Pa. 1854) ("Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation. . . .").

Phelin v. Kenderdine, 20 Pa. 354, 1853 WL 6203, at *6-*7 (Pa. 1853) (In affirming an award of exemplary damages in an action by a parent for the seduction of his daughter, the court noted that "[t]he distinguished advocate of the principle, that damages in actions of tort are, in all cases, to be limited to mere compensation for the injury sustained by the plaintiff, admits that the doctrine of exemplary damages 'finds more countenance from the bench in Pennsylvania than in any other quarter:' 2 Greenl., § 253, note. A long course of practice, evidenced by numerous decisions, reported and unreported, has settled the doctrine in this state so firmly that it would be a waste of time to discuss the question. Nor can it be said that our state Courts are singular in this respect. We do but adopt the language and the doctrine of the Supreme Court of the United States, when we declare that 'it is a well-established principle of the common law, that, in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.'" The court further noted that "the fraudulent means used in perpetrating the injury must add to the enormity of the outrage, and demand a higher measure of compensation and

punishment.") (citing *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)).

McBride v. McLaughlin, 5 Watts 375, 1836 WL 3051, at *2 (Pa. 1836) (In an action of trespass for a willful and malicious abuse of process and sale of the plaintiff's property, the state's highest court upheld a punitive damages award, explaining that "the authorities teach that damages may be given, in peculiar cases, not only to compensate, but to punish. . . . Mental or bodily pain is doubtless a legitimate subject of amends; produced, however, not by the infliction of suffering, but by a pecuniary equivalent. The enhancement of damages by the ability of the defendant, not being designed for the benefit of the plaintiff, must consequently be for something beyond compensation. That corrective damages may be given for the sake of example, is as old as the law itself.").

Porter v. Seiler, 23 Pa. 424, 1854 WL 6374, at *5 (Pa. 1854) (In an action of trespass to recover damages for assault and battery, the court upheld an award of punitive damages by a jury which had been "instructed that if they believed the attack was wanton and unprovoked, and with a deadly weapon, they could give exemplary, or even vindictive damages, if necessary to repress the practice of carrying and using deadly or dangerous weapons.").

Phillips v. Lawrence, 6 Watts & Serg. 150, 1843 WL 5130, at *4 (Pa. 1843) (In an action for damages arising from a breach of warranty of goods, the state supreme court explained that in a proper case a jury "are at liberty to give vindictive or exemplary damages" not only in "consideration of the mental suffering of such party produced by the conduct of the opposite party, or with a view to promote the peace and quiet of society, and to protect every one in the full enjoyment of his rights."). *See Manderson v. Commercial Bank of Pa.*, 28 Pa. 379, 1857 WL 7384, at *4 (Pa. 1857) ("It is true that . . . considerations of a public character . . . do not touch directly the private right of the plaintiff. But it is no new thing in the administration of individual justice to have

some regard for the interests of the community. It is upon this principle that exemplary damages are given in civil actions for the redress of private injuries.").

SOUTH CAROLINA - *Greenville & C.R. Co. v. Partlow*, 48 S.C.L. (14 Rich.) 237, 1867 WL 2699, at *5 (S.C. Ct. App. Law 1867) (In a trespass action, a railroad was awarded punitive damages against a farmer who, in an apparent effort to keep his cattle from escaping, erected fences too close to the railroad tracks, which were struck by an engine, damaging the engine and destroying a stretch of track. In affirming the award, the court rejected the defendant's argument that even in a case of malicious trespass, "the amount of the verdict must be restricted to the damages proved," explaining that not only did that "proposition want[] the support of authority," but that "the right of the jury, in actions for malicious torts, to find vindictive damages, had never before been questioned." Indeed, historically, "'[i]t was the province of the jury to weigh well and consider all the circumstances of the case, and to assess such damages as they thought would be [both] commensurate with the injury, and such as would effectually check such an evil.'"). *See also Rowe v. Moses*, 43 S.C.L. (9.Rich.) 423, 1856 WL 3272 (S.C. Ct. App. Law 1856) (discussing same).

Windham v. Rhame, 45 S.C.L. (11 Rich.) 283, 1858 WL 4237, at *2-*3 (S.C. Ct. App. Law 1858) (In an action for damages caused by the defendant's obstruction of the right of way to a public landing, the court affirmed the jury's award of exemplary damages, explaining that "[i]f personal property is maliciously injured or destroyed, in an action of trespass, the extent of relief is not limited to the actual loss," and "[t]he general rule adopted in injuries to person, character or property, whether the action be trespass or case, is that all the attending circumstances, showing a malicious motive, may be given in evidence, and damages may be awarded not only to recompense the plaintiff but to punish the defendant." Moreover, the availability of exemplary

damages serves an important public purpose: the prevention of violence by injured parties seeking vindication outside the courts. Thus, "if the plaintiff had endeavored either to repossess himself of his property, or to assert his right to the use of the way by abating the nuisance, otherwise than by due course of law, the consequences probably would have been a breach of the peace." Finally, "[w]here a nuisance is not abated, after one verdict, the jury may give punitive damages in a second action brought for the continuance of the nuisance, upon the ground, that from his failure to abate it, after verdict, it is presumed that the defendant's original act was wilful, and from which an intention to continue the nuisance is inferred.").

TENNESSEE – *Byram v. McGuire*, 40 Tenn. (3 Head) 530, 1859 WL 3533, at *1 (Tenn. 1859) (In an action in trover and negligence for the intentional killing of a farmer's mule by a neighbor's servants, the court affirmed an award of punitive damages, explaining the general rule that "[i]n cases of fraud, malice, gross negligence, or oppression, the law, upon authority not now to be questioned, permits the jury to give what it terms punitory, vindictive or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender.") (citation omitted).

TEXAS – *Graham v. Roder*, 5 Tex. 141, 1849 WL 4070, at *4-*5 (Tex. 1849) (In affirming an award of punitive damages, the court held that "'[t]he authorities teach that damages may be given in peculiar cases, not merely to compensate, but to punish. There are offenses against morals to which the law has annexed no penalty as public wrongs and which would pass without reprehension did not the providence of the court permit the private remedy to become an instrument of public correction,'" and that "'fraud is commonly a case for vindictive or exemplary damages.'" Indeed, allowing the jury to give "'punitory, vindictive, or exemplary damages . . . blends together the

interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender. This rule seems settled in England and the general jurisprudence of this country.'").

Champion v. Vincent, 20 Tex. 811, 1858 WL 5406, at *5 (Tex. 1858) (In reversing a trial court decision to disallow punitive damages in an action for trespass, the state's highest court held that "this was not a bare technical trespass; it was committed deliberately, in willful violation of the plaintiff's rights, in a manner and under circumstances of aggravation, showing a violent, reckless and lawless spirit; and in such cases the law allows damages beyond the strict measure of compensation, by way of punishment and for example's sake. . . . There was nothing to justify or palliate the act; it was just such an act as necessarily tends to violence and breaches of the peace, and neighborhood animosities; which destroy the harmony, peace and good order of society; and was eminently a case for damages by way of punishment and prevention.").

Cole v. Tucker, 6 Tex. 266, 1851 WL 3979, at *2 (Tex. 1851) ("[W]here trespass is committed in a wanton, rude, or aggravated manner indicating a desire to injure, a jury ought to be liberal in compensating the party injured in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation; and even this may be exceeded by setting a public example to prevent the repetition of the act. In such cases there is no certain fixed standard, for a jury may properly take into view not only what is due to the party complaining, but to the public, by inflicting what are called in law speculative, exemplary, or vindictive damages.") (citations omitted).

VERMONT – *Nye v. Merriam*, 35 Vt. 438, 1862 WL 2609 (Vt. 1862) ("When, in an action on the case for deceit, the evidence tends to show that the defendant wilfully and intentionally purposed to deceive and defraud the plaintiff, then exemplary damages for such wilful fraud are allowable. Without adverting particularly to the authorities upon this

much discussed point, we deem it sufficient to say that we understand the law to have [] been long settled in this state, that wilful fraud, as well as malice, may be punished by exemplary damages in an action of tort."). *See Learned v. Bellows*, 8 Vt. 79, 1836 WL 1226, at *1 (Vt. 1836) ("In actions of trespass, it is well settled, that the measure of damages, is not limited by the value of the property. The value of the property is usually the actual damage. But the jury may even in a case of trespass de bonis asportatis, give consequential or exemplary damages, and even vindictive damages.").

VIRGINIA – *Peshine v. Shepperson*, 58 Va. (17 Gratt.) 472, 1867 WL 2892, at *8-*10 (Va. 1867) (In an action of trespass by a Virginia shopkeeper against an out-of-state dry-goods merchants who allegedly employed self-help to retrieve unpaid goods from the plaintiff's store, the state supreme court explained that although the defendants sought an instruction limiting their damages to the value of plaintiff's goods, where, as in this case, the evidence establishes that "the trespass is accompanied by circumstances of aggravation, . . . the theory of compensation, properly speaking, fails as a rule of damages. . . . {T]he jury in such cases are not limited by the rule of compensation, but may give what are called indifferently exemplary, punitive or vindictive damages, for the sake of punishment and example. The discussion as to the theory of damages has been conducted with great learning and ability by Prof. Greenleaf in favor of the rule of compensation and by Mr. Sedgwick against it. . . . The views of Mr. Sedgwick are sustained by the Supreme Court of the United States and by the courts of most of the states. . . . ") (internal citations omitted).

WISCONSIN – *McWilliams v. Bragg*, 3 Wis. 424, 1854 WL 3450, at *4 (Wis. 1854) (The Court affirmed an award of punitive damages in action of trespass for assault and battery, and held that the jury was correctly charged: "If the offense is committed willfully, the jury have a right to give

damages as a punishment to the defendant, for the purpose of making an example, and as a warning to him and others, in addition to the damages, which are as a compensation for plaintiff's injuries." The Court explained that "the great weight of authority in the American courts is in favor of permitting juries in actions of this character, not only to take into consideration the actual injury sustained by the plaintiff, but, where that injury is inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness and malice; but in view of all such circumstances, to impose what is sometimes termed exemplary, and sometimes punitory damages, in addition to the actual damages.").